Subject Index

	Page
Opinions below	1
Jurisdiction	2
Statutes involved	2
Questions presented	3
Statement of the case	3
Summary of argument	10
Argument	15
I. Congress intended that the law of respondeat superior, applicable to private employers in the state where the tort is committed, should apply in determining the issue of scope of employment of members of the armed forces. The contrary holdings of the court below should be disapproved and the judgment reversed	15
A. By the express terms of the Act, Congress intended that the United States shall be liable in the same manner and to the same extent as a private individual under like circumstances. Congress by this declaration, and by providing what law shall apply, made known its intention to impose liability upon the government under respondeat superior and not under some restricted theory	17
B. The use of the term "line of duty" is significant only insofar as it may be a conscious congressional recognition that governmental liability for the acts of a soldier may be broader than for acts of civilian personnel. The required liberal construction should give it this effect	19
C. The substantive rules of respondeat superior of the state where the tort is committed, not federal law and decisions, determine whether an act is committed within the "scope" of employment of a soldier	23
II. Under normal rules and tests of respondeat superior the record on the issue of scope of employment is uncontradicted and documentary. This court should decide these questions in petitioner's favor and leave the determination of the issue of damages to the trial court	29

Page

A. Since the specific act of driving the army vehicle for recreation was itself an authorized act, the soldier's negligence in performing that act gives rise to governmental liability 29

1. In the factual context of this case the soldier in using the vehicle for his own recreation was in part serving governmental purpose. The well-reasoned case of Murphey v. U. S., is direct authority to that effect. Thus, the evidence herein meets the ultimate test of scope of employment 30

2. The soldier-driver here at all times was under the control and subject to the right of control of the military, even while on pass. The evidence thus meets the ultimate test of liability under respondeat superior 36

3. The fact that the soldier-driver negligently or wrongfully performed the authorized act of driving for recreation does not relieve the government of liability 38

B. Even if the soldier-driver's authority to drive was limited to transportation to and from government-provided recreation facilities, his acts were within his scope of employment 40

C. The uncontradicted evidence of custom and practice conclusively establishes the authority of the soldier-driver in the two respects here relied on: (1) authority to drive the vehicle itself for recreation; (2) authority to drive the vehicle to and from government-provided recreational facilities. This custom and practice also proves that any violation of army regulations did not affect that authority 42

D. Since the evidence is uncontradicted and documentary, this court may make its own determination on the issue of scope of employment 49

III. The acts in line of duty of releasing to a drunken soldier an army vehicle constituted in themselves such negligence as to impose liability upon the Government 50

Conclusion 52

Table of Authorities Cited

Cases	Pages
Barber v. Gonzales, 347 U.S. 537	21
Cannon v. United States, 188 F. 2d 444	14, 45, 46, 47
Capital Transit Co. v. United States, 183 F. 2d 825	18
Carr v. Wm. C. Crowell Co., 28 C. 2d 652	50
Christian v. United States, 184 F. 2d 523 (6th Cir. 1950)	39
Deevy v. Tassi, 21 C. 2d 109	39
Ellis v. American Hawaiian S.S. Co., 165 F. 2d 999 (9th Cir.)	33
Employer's Liability Assurance Corp. v. I.A.C., 37 C.A. 2d 567	34, 43
Feres v. United States, 340 U.S. 135, 71 S. Ct. 157	18, 23, 24
Fields v. Sanders, 29 C. 2d 834	39
Harper v. Jones, 195 F. 2d 705	38
Haworth v. Elliott, 67 C.A. 2d 77	39
Hironimus v. Durant, 168 F. 2d 258 (4th Cir. 1948)	35
Hiroshima v. Pac. Gas & Elect. Co., 18 C.A. 2d 24	20, 39
Jiminez v. Liberty Farms Co., 78 C.A. 2d 458	34
King v. United States, 178 F. 2d 320 (C.A. 5)	29
Larson v. Industrial Accident Commission, 193 Cal. 406	34
McConville v. United States, 197 F. 2d 680 (2d Cir. 1952)	25, 27
Murphey v. United States, 179 F. 2d 743	12, 13, 15, 30, 32, 33, 37, 40, 41, 42, 44, 48, 49, 52
Pacific Employer's Ins. Co. v. I.A.C., 77 C.A. 424	34
Pacific Indemnity Co. v. I.A.C., 26 C. 2d 509	34
Ryan v. Farrell, 208 Cal. 200	30
State Compensation Insurance Fund v. I.A.C., 194 Cal. 28	34
Truck Insurance Exchange v. I.A.C., 27 C. 2d 813	34
Union Oil Co. v. I.A.C., 211 Cal. 398	34
United States v. Campbell, 172 F. 2d 500	21
United States v. Eleazer, 177 F. 2d 914	29

Pages

United States v. Standard Oil Company of Calif., 332 U.S. 301 ..... 23, 25
United States v. Yellow Cab Co., 340 U.S. 543, 71 S. Ct. 492 22

Vertex Inv. Co. v. Schwabacher, 57 C.A. 2d 406 44
Villanazul v. City of Los Angeles, 37 C. 2d 718 36

Watt v. United States, 123 F. Supp. 906 (E.D. Ark. N.D., Sept. 13, 1954) 25, 26
West v. I.A.C., 79 C.A. 2d 711 34

Statutes

California Civil Code, Section 2316 43

United States Code, Title 28 (reenactment of Federal Tort Claims Act, 62 Stat. 933, 982, 983) 2
Section 1346 ..... 2, 7
Section 1346(b) 2, 3
Section 2401(b) 3
Section 2671 ..... 2, 3, 16
Section 2674 ..... 2, 17

28 U.S.C. 1254(1) 2

Texts

27 Cal. Jur. 393, Workmen's Compensation, Section 90 34

Restatement of the Law of Agency:
Section 220 37
Section 228, Comment a 23, 36
Section 229 ..... 26, 39, 47
Section 229, Comment a 50
Section 229, Comment b 48
Section 230 ..... 39, 49

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 470

ALTHEA G. WILLIAMS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S OPENING BRIEF ON THE MERITS.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Northern District of California, Southern Division (R. 44) is reported at 105 F. Supp. 208. The opinion of the Court of Appeals for the Ninth Circuit (R. 168) is reported at 215 F. 2d 800.

JURISDICTION.

The judgment of the Court of Appeals was entered on Septemebr 8, 1954 (R. 167). The petition for a writ of certiorari was filed on December 6, 1954. The order granting certiorari was filed January 31, 1955 (R. 183). Jurisdiction of this Court is invoked under 28 *U.S.C.* 1254(1).

STATUTES INVOLVED.

Sections 1346(b), 2674 and 2671 of Title 28 *U.S.C.* (the reenactment of the Federal Torts Claims Act, 62 Stat. 933, 982, 983) provide in pertinent part:

> Section 1346. United States as defendant.
>
> * * * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * * * *
>
> Section 2674. Liability of United States.
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims,

in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * * * *

Section 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b of this title, the term—

* * * * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

QUESTIONS PRESENTED.

1. Is a United States soldier, stationed at an overseas United States governmental facility on Guam, "acting in line of duty" within the meaning of the Federal Tort Claims Act, where his Army superiors give him a pass, an Army vehicle and a trip ticket for recreational purposes, and which he uses for such purposes in accordance with the long-established Army practice at such overseas station?

2. Do federal law and federal administrative regulations, or does the law of the place where an alleged tort is committed, apply in determining whether a member of the armed forces is "acting in line of duty" within the meaning of the Federal Tort Claims Act?

3. Was the term "acting in line of duty" intended by Congress to restrict federal liability under the Federal Tort Claims Act to a smaller area of liability than that of a private individual under normal principles of *respondeat superior?*

4. Since the sole evidence on the issue of scope of employment was documentary, may this Court review the evidence and make its own determination of that issue?

STATEMENT OF THE CASE.

Petitioner filed her complaint in the District Court under the Federal Tort Claims Act to recover damages for severe and painful permanent injuries sustained through the negligent driving of a United States Government vehicle by a soldier on the Island of Guam (R. 1). Petitioner contends that the soldier was acting within the scope of his employment at the time of the accident. The respondent United States filed an answer denying all allegations as to negligence, scope of employment, causation, injuries, and amount of damages (R. 6).

Prior to filing its answer, respondent moved for a summary judgment on the grounds that the soldier

at the time of the accident was not acting in the line of duty nor in the course of employment by the United States (R. 3).

Reference was made in the motion to records on file in respondent's San Francisco office. Petitioner filed her affidavit in opposition to the motion, stating that at the trial she would develop the liability of respondent based upon these facts: The vehicle driven by the soldier and which caused injuries to plaintiff was an Army weapons carrier owned by the respondent. There had been delivered to the soldier, for recreational purposes, a pass and a trip ticket issued for the vehicle, permitting him to drive respondent's vehicle. This covered the driver with an authorized recreational status. Such status was in the interests of respondent for morale maintenance. In accordance with the procedure in effect at the time and place, the trip ticket and the permission of respondent to drive the vehicle assumed that the recreational driving at the said time and place was in the nature of authorized Army activities. Respondent had clothed the soldier's driving with official sanction and had granted him express permission to drive the vehicle. His trip in that sense was actually official business (R. 4).

The District Court, after hearing, denied respondent's motion for summary judgment (R. 4-5).

The evidence at the trial was as follows:

The accident occurred on the evening of March 3, 1949 at about 10:30 o'clock P.M. (R. 58). Petitioner plaintiff was sitting in another U. S. Army vehicle,

parked at the end of the Breakwater Road at the town of Agana on the Island of Guam (R. 58). Plaintiff's vehicle was struck by a ¾ ton Army weapons carrier being driven by Corporal Joe Seabourn of the United States Army (R. 61). Petitioner was seriously and permanently injured (R. 35-36, 39-40).

Soldiers stationed on Guam technically were on duty 24 hours per day (R. 30). At the time of the accident, Seabourn was a supply clerk stationed on Guam with a service detachment (R. 27). In the performance of his duties, he occasionally drove an army weapons carrier (R. 27). On March 3, 1949, he had been issued an Army operator's permit for any vehicle up to 2½ tons (R. 27).

About 8:00 A.M. on the day of the collision, Seabourn, while on pass (R. 27), and two other soldier buddies, also on pass—Sgt. Vincent and Pfc. Schmidt —went to a tavern about a mile from Harmon Field and spent most of the morning drinking (R. 132). In the afternoon, the three hired a cab and went about Agana, drinking, until 6:30 P.M. when they returned to the base (R. 132).

At 8:00 P.M. Seabourn went to Sgt. Stiles of his company and obtained an official "trip ticket" for a ¾ ton weapons carrier assigned to the 374th T.C.W. (R. 129, 28). The trip ticket was good for that vehicle until 9:30 A.M. the next day. (It was made out to Pfc. Carbera) (R. 28).

Seabourn and his companion, Pfc. Richard Schmidt, both testified that trip tickets in service stock always

were passed around between the men working in that section regardless of the name of the individual to whom the trip ticket was made out (R. 126). This was the usual procedure (R. 127); and it applied whether the vehicle was to be used for work or recreation. Vehicles were necessary for recreational purposes in view of the distances on Guam between station points and recreational facilities (R. 127). All officers and enlisted men in Seabourn's unit followed the practice of thus circulating trip tickets (R. 131).

Seabourn's superior officers had jeeps and the enlisted men used weapons carriers, as Seabourn did on the night of the collision (R. 131).

The practice had prevailed on Guam for at least fifteen months prior to the accident (R. 130).

Having obtained the official trip ticket authorization at 8 p.m. on the day in question, the proper Army authorities at the motor pool gave Seabourn the weapons carrier (R. 128). After this, he and his two companions, driving the vehicle, checked out of the base in the usual manner and went to the official Army NCO Recreational Club and to Agana (R. 128). Neither Schmidt nor Vincent drove the carrier. They left Seabourn before the collision (R. 132).

The District Court for the Northern District of California Southern Division, found that petitioner suffered severe bodily injuries as a result of the accident; that the accident was entirely due to the negligence of the soldier; that the soldier was, at the time of the accident, off duty; that the soldier had obtained

unauthorized possession of the vehicle; that the soldier's use of the vehicle was not for a purpose authorized by his commanding officer; that the soldier was merely off on a frolic of his own; and the Court concluded that the soldier, an employee of respondent, was not acting within the course and scope of his employment (R. 50).

The Memorandum Opinion, filed by the Honorable Judge Roche on June 4, 1952, contains an erroneous statement of fact. The opinion states (R. 45):

> "On the other hand Sgt. Stiles states that the vehicle was to be used for official business only; that because the vehicle was on 24 hours dispatch and was used officially by all men in the Section who had permits; that it was good on the post only."

This statement is based on the affidavit of Sgt. Stiles (R. 155). But this affidavit was admitted subject to a motion to strike, which motion was granted (R. 48).

An important portion of the memorandum opinion follows:

> "Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officers in charge, it would not make the United States liable. . . . By the Tort Claims Act the United States has consented to be sued for the negligence of its employees only when they are acting within the scope of their employment which, in the case of military personnel, means acting in the line of duty. *To determine whether the person inflicting the injury was an employee*

so acting, we look to Federal law and decisions . . ." (R. 45.) (Emphasis supplied.)

On October 22, 1952, judgment was entered for respondent. On November 21, 1952 petitioner filed her Notice of Appeal (R. 53). On September 8, 1954 the Ninth Circuit filed its opinion, affirming the judgment below (R. 168). Important portions of this opinion follow:

"We disagree with appellant's contention that our decision in Murphey v. United States, supra, when laid off against the facts revealed by the record before us, is dispositive of the vital and controlling issue in the instant case. We are fully persuaded that the Murphey case is clearly distinguishable on the facts . . ." (R. 174.)

* * * * * * *

"As we point out herein, one important problem was met and disposed of by a specific provision in the Act which carefully delimited the area of federal liability for a tortious act of (as here) a soldier, by providing that such liability would attach *only* when the act was committed while the soldier was 'acting in the line of [military] duty.' This careful delineation provides a clear line of demarcation between Government liability for a soldier's torts and the area of general liability of a private employer for torts of his employees in classical 'master and servant' cases where the rule of respondeat superior is normally applied . . ." (R. 177-178.)

* * * * * * *

". . . as to . . . civilian employees, the familiar doctrine of respondeat superior, as it has been

applied under California law to the commonplace 'master and servant' cases, would apply.

"But in dealing with the problem of federal liability for tortious acts of members of the military and naval forces a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this 'master and servant' doctrine . . ." (R. 178-179.)

* * * * * * *

SUMMARY OF ARGUMENT.

Both the trial court and Court of Appeals erroneously have held that the issue of scope of employment of a soldier is to be determined by federal laws and regulations. This error led the trial court to disregard petitioner's evidence of the custom and practice on Guam with respect to recreational use of army vehicles. The mistake of the Court of Appeals was even worse. It not only disregarded the evidence, but, finding erroneously violations of army regulations, i.e., federal regulations, concluded that acts pursuant to custom and practice automatically placed such acts outside the scope of the soldier's employment. This latter conclusion also followed from a novel and erroneous construction of the Tort Claims Act. The Ninth Circuit herein has held that while the substantive law of *respondeat superior* applies with respect to civilian personnel of the government, it does not apply in fixing liability for acts of members of the armed forces. It bases this error on the fact that Congress used the term "line of duty" as a definition of the

"scope of employment" of soldiers and that by the use of said term Congress intended to abandon *respondeat superior* in favor of some more restricted theory.

Petitioner contends, however, that the Tort Claims Act explicitly provides that the United States shall be liable under the same circumstances where a private employer is liable, and expressly incorporates the substantive law of the state where the tort is committed. These provisions mean that the issue of scope of employment is to be determined by the rules and tests of conventional *respondeat superior*. This Court and other courts have so declared. A contrary interpretation also violates the rule of this Court that the Tort Claims Act is to be liberally construed.

Furthermore, if the use of the term "line of duty" has any significance, it is that Congress recognized that governmental liability for acts of soldiers may be *broader* than for civilian personnel, since that term has had a long and technical military significance whereby many acts traditionally considered outside the scope of employment of civilians have been held in military circles to be "in line of duty". And while federal law, of course, applies in determining the nature and incidents of federal employment between the government and its employees, this would be so as to any type of federal employee, *but only inter sese*, not in determining the issue of scope of employment, *i.e.*, liability of the government in relation to third persons. To so apply federal law under the Tort Claims Act would result in incongruities ob-

viously not intended by Congress. Here, and in other cases where custom and practice in conflict with federal regulation have been held not to affect the regulated "authority" of a soldier, the result is that the government escapes liability upon legal fiction rather than fact. Congress did not intend to adopt the state substantive law of *respondeat superior* for one class of employees and to create, since *Erie v. Tompkins,* a new federal common law of *respondeat superior* for another class.

If normal rules and tests of *respondeat superior* are applied to the evidence in this case, governmental liability is clear in at least three of the following alternatives:

First, the specific act of *driving* the army vehicle *itself* was an authorized act. The recreational use of an army vehicle by a single soldier has been correctly held in *Murphey v. U. S.,* 179 F. 2d 743, to be an act in furtherance of a governmental purpose, where, like here on the small, remote, overseas post of Guam, the relief of monotony and the improvement of morale is of prime governmental concern. This meets the ultimate test of scope of employment—serving the master's purpose. And even army legal decisions on the issue of scope of employment recognize this rule. Furthermore, the soldier-driver here at all times was under the control and subject to the right of control by the military, even while on pass. This meets the ultimate test of liability under *respondeat superior.* And since the specific authorized act was driving the army vehicle for recreation, the

fact that the driving was being done negligently or while in an intoxicated condition does not place the act outside the scope of employment. This is not the traditional "frolic" situation. Instead, an authorized act namely, driving the Army vehicle, was done negligently. The mere fact that the authorized act was done in a wrongful or prohibited manner does not preclude responsibility under *respondeat superior.*

Second, even if the soldier-driver's authority were deemed restricted to the use of the army vehicle for driving to and from the government-provided recreational facility, the N.C.O. club, still his acts were within the *scope* of employment. This situation is the same as in *Murphey v. U. S.,* supra, and if the driver in that case was not on a frolic of his own, then neither was the driver here. The cases are not distinguishable.

Third, even if the soldier-driver may not have been acting in "line of duty" in negligently or drunkenly driving the army vehicle into petitioner, then at least the dispatcher in issuing to a drunken soldier the vehicle in question was acting in "line of duty" and his commanding officer, Lt. Werb, in authorizing the use was acting in "line of duty". Their acts in so doing should create liability. The ultimate test of vicarious liability is whether it is just that the employer or the person injured should bear the loss. Here petitioner was seriously injured and disabled for life. The entire practice of issuing to soldiers vehicles for driving to and from a recreational facility, where drinking is done; in, specifically, issuing to a soldier

who had been drinking all day a vehicle for the purpose of going to a place of additional drinking, is such an entire tortious transaction, clearly within the Government's power to prevent, as to make it just that petitioner recover.

Proof of each of the three alternative bases of liability grounded on actual authority lies in petitioner's evidence of custom and practice. Evidence of custom under state law is relevant in determining whether an act is contemplated by the employment. Under the applicable California law actual authority is defined as that which a principal by want of ordinary care allows the agent to believe he possesses. The army itself, in legal determinations of "scope of employment," looks to evidence of custom, even when it conflicts with standing orders. And in the latter respect, the conclusion of the Ninth Circuit that the so-called "loose post practice" violated army regulations and made the driving for recreation unauthorized, is also wrong. Army regulations vested in Lt. Werb, the soldier-driver's superior, the authority to allow recreational use of vehicles in connection with organized and supervised morale-building activities. As in *Cannon v. U. S.*, 188 F. 2d 444, the lieutenant's authorization of a practice to transport soldiers to and from the N.C.O. club was a "in line of duty" factual determination. Such regulation was held applicable, and the act of so driving was held authorized. Such a finding makes the act itself authorized, or "in line of duty", under the rule of that case, even though the finding is incorrect. And the mere recreational driv-

ing of a single soldier may well be considered "incidental" to such an authorized act.

Since the evidence above is uncontradicted and appears in depositions of United States witnesses, this Court can and should determine in petitioner's favor, for itself, the issue of scope of employment and remand to the trial court the issue of damages.

ARGUMENT.

I. CONGRESS INTENDED THAT THE LAW OF RESPONDEAT SUPERIOR, APPLICABLE TO PRIVATE EMPLOYERS IN THE STATE WHERE THE TORT IS COMMITTED, SHOULD APPLY IN DETERMINING THE ISSUE OF SCOPE OF EMPLOYMENT OF MEMBERS OF THE ARMED FORCES. THE CONTRARY HOLDINGS OF THE COURT BELOW SHOULD BE DISAPPROVED AND THE JUDGMENT REVERSED.

Throughout the course of the instant litigation petitioner has insisted steadily that the authorized pursuit of recreation with government provided facilities may be activity within the scope of authority or line of duty of members of the armed forces. Petitioner has relied on direct authority to that effect,—*Murphey v. U.S.*, 179 Fed. 2d 743 (9th Cir. 1950).

Petitioner has been met in the Courts below, however, by two apparently inconsistent positions. On the one hand, the lower Courts have found distinctions between the instant case and the *Murphey* case. But as petitioner pointed out below, no real distinction exists between them.

Actually, it is the second position which indicates a more fundamental error. This position is that the

definition in Sec. 2671 of the Tort Claims Act (that course of employment means "acting in the line of duty" with respect to soldiers) was intended by Congress to relieve the government of liability in situations where private employers in similar situations might nevertheless be liable. Spelled out, it would mean that in determining whether a soldier is "acting in line of duty," *federal* law and *federal* regulations shall control without regard to orthodox principles of *respondeat superior.*

Because the evidence is uncontradicted, the Courts below in accord with this second position, thus held have *as a matter of law:* (1) The authorized practice on Guam of military personnel passing around trip tickets for recreational use of vehicles is *irrelevant* to the issue of scope of employment; (2) The fact that such practice authorized on Guam violated certain Army Regulations conclusively determines that activity pursuant to such practice is outside the scope of employment; (3) Any activity contrary to Army Regulations, i. e. federal law and decisions, such as drunk-driving, *ipso facto* is activity outside the scope of employment.

Petitioner contends that such interpretations of the Act, being contrary to rules of *respondeat superior,* violate a clear congressional intent, and the failure to follow a correct interpretation has left petitioner's case still factually undecided.

A. By the Express Terms of the Act, Congress Intended That the United States Shall Be Liable in the Same Manner and to the Same Extent as a Private Individual Under Like Circumstances. Congress by This Declaration, and by Providing What Law Shall Apply, Made Known Its Intention to Impose Liability Upon the Government Under Respondeat Superior and Not Under Some Restricted Theory.

Section 2674 of the Act provides:

> "The United States shall be liable respecting the provisions of this title relating to tort claims *in the same maner and to the same extent as a private individual under like circumstances,* but shall not be liable for interest prior to judgment or for punitive damages."

What clearer declaration of intention could there be? This section means just what it says. If under rules of *respondeat superior,* as applied to the circumstances of the case, a private employer would be liable, the government shall be liable. This is further borne out by the requirement of Sec. 1346 of the Act:

> "The District Court . . . shall have jurisdiction of civil actions on claims against the United States, for money damages . . . for personal injury or death caused by the negligent . . . act . . . of *any* employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*"

The only possible reference that the last quoted portion could have is to the practically universal rules of *respondeat superior, not federal law.*

Petitioner, however, need not rely solely upon the plain meaning of this statute. These phrases have been judicially construed. In holding that the government was not liable *under this Act* for injuries to servicemen arising out of or in the course of activity "incident to service", this Court has stated:

> "Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law."
>
> "For this purpose, the Act goes on to prescribe the test of allowable claims, which is, 'The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .' It will be seen that this is not the creation of new causes of action but *acceptance of liability under circumstances that would bring private liability into existence* . . ."
>
> * * * * * * *
>
> "It is not without significance as to whether the act should be construed to apply to service-connected injuries that it makes '. . . the law of the place where the act or omission occurred' govern any consequent liability . . . *This provision recognizes and assimilates into federal law the rules of substantive law of the several states* . . ."
>
> (Emphasis added).
>
> *Feres v. U.S.*, 340 U.S. 135, 71 S.Ct. at 157.

As the Court said in *Capital Transit Co. v. U. S.*, 183 F. 2d 825, at 829:

> "The reference to liability merely means that the *same substantive law* should govern the question

whether an employee of the United States had committed a tortious act for which the United States was responsible and that the same measure of damages should be applicable, as if the United States were a private party. Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 32."

It is, therefore, clearly apparent that Congress intended the substantive law of *respondeat superior* to govern its liability in all tort claims, and not some restricted theory.

B. The Use of the Term "Line of Duty" Is Significant Only Insofar as It May Be a Conscious Congressional Recognition That Governmental Liability for the Acts of a Soldier May Be Broader Than for Acts of Civilian Personnel. The Required Liberal Construction Should Give It This Effect.

Respondent argued before the Ninth Circuit that the government's liability for the acts of a soldier is *limited by the doctrine of respondeat superior.* Quoting from its brief:

". . . this provision of the Act was not designed to put military personnel into a separate category as to which there would be different standards of liability. The purpose was just the opposite—the provision was designed to place the military in the same category as civilian personnel . . ."

The Ninth Circuit, however, held (R. 179):

". . . as to . . . civilian employees, the familiar doctrine of respondeat superior, as it has been applied under California law to the commonplace 'master and servant' cases, would apply. But in dealing with the problem of federal liability for tortious acts of members of the military and naval forces a wholly different situation is pre-

> sented because Congress saw fit to adopt a drastic modification of this 'master and servant' doctrine. . . ."

The Court then holds, without citation of authority, that the "plain meaning" of "line of duty" *restricts* governmental liability for torts of soldiers. This gratuitous conclusion is wrong.

Petitioner contends that the same substantive law of *respondeat superior*—the same rules, tests and distinctions—apply to the tort of a soldier as to the tort of a civilian employee. As the Court said in *Hiroshima v. Pac. Gas & Elect. Co.*, 18 C.A. 2d 24, at 30, quoting from a text:

> "Expressions equivalent to scope of employment are, line of duty. . . ."

This is the view of the Fifth Circuit. In dismissing the tort claimant's argument that "line of duty" *broadened* the liability of the government, the Court held:

> "Such a construction would be to give to the phrase, 'within the scope of his office or employment' not one consistent meaning throughout the act, but two inconsistent meanings, one of these applying to acts of all government employees except members of the armed forces, would subject the United States to liability to third persons for acts of its employees only as and to the same extent that a person in private employment would be liable under the law of the state where the accident occurred. The other, applying to acts of military personnel would subject the Government to fantastic claims of liabil-

> ity having no relation to the doctrine of respondeat superior, as it is known and applied, in determining the liability of private persons. It would do this, too, in the face of the known purpose of the Tort Claims Act, as shown by its antecedent history, and the record made in its passage, to make the United States liable to third persons for the acts of its employees under the same circumstances, and no other, as those under which private persons would be liable for the acts of their employees according to the law of the place where the injury occurred."
>
> *U. S. v. Campbell,* 172 Fed. 2d 500, 503.

Petitioner additionally contends, however, that if there is any other significance to the use of the term "line of duty" it is that Congress recognized the term does *broaden* the liability for acts of members of the armed forces. For this term has had a long and *liberal* construction in military law. And in the absence of explicit language showing contrary congressional intent, technical words in statutes must be given their usual technical meaning. *Barber v. Gonzales,* 347 U.S. 537.

Thus Army Regulation 600-140 provides in part:

> "(c) Presumptions—Injury, disease or death incurred by a member of the Army while in active duty, or engaged in authorized training in inactive status will be *presumed* to have been incurred *in line of duty* and not because of the member's own conduct." (Emphasis added.)

And interpretations by the Judge Advocate General illustrate the liberality in construction of this

phrase. Thus, injuries from a motor vehicle accident suffered by soldiers while on pass may be incurred "in line of duty". Op JAGN 1952/95, 23 January 1952. Death while hitchhiking may be in "line of duty". Op JAGN 1952/86. Failure of a motor vehicle driver to have a driver's license and proper tags on his motor vehicle did not prevent a determination of line of duty in Op JAGAF 1953/35, 21 September 1953.

But regardless of the technical or non-technical meaning of the phrase "line of duty", the approach of the 9th Circuit in delineating a *narrower* liability in the case of members of the armed forces, clearly conflicts with the approach of this Court. In *U. S. v. Yellow Cab Co.,* 340 U.S. 543, 71 S.Ct. at 492 this Court said:

> "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person. . . ."

In holding that the Act covered claims for contribution, this Court, based upon those broad words of waiver, held that the Act should be liberally construed. The Court reviewed the legislative history of the Act, and concluded in footnote 8 that the trend of that history was one of broad lines of waiving immunity. Certainly the Ninth Circuit has disregarded this trend in the instant case.

C. The Substantive Rules of Respondeat Superior of the State Where the Tort Is Committed, Not Federal Law and Decisions, Determine Whether an Act Is Committed Within the "Scope" of Employment of a Soldier.

As set forth in the Statement of the Case hereto, the District Court held that whether the person inflicting injury was an employee "so acting" within the scope of his employment is determined by federal law and decisions (R. 45). The Ninth Circuit likewise so held on the ground, *inter alia,* that it is a question of construction of federal legislation (R. 178). Petitioner contends that the statutory adoption of state rules of *respondeat superior* necessarily makes these holdings invalid.

Both lower courts have loosely analyzed the case. Actually there are two distinct questions involved here. One is the actual employment, the rights and duties, of the government and employees, *inter sese.* The other is the "scope" of their employment *in relation to third party claimants.*

> "a. The word 'employment' means the subject matter as to which the master and servant relationship exists. The words 'scope of employment' mean the extent of this subject matter and denote the field of action within which one is a servant."
>
> Restatement of the Law-Agency, Sec. 228, Comment a.

The lower courts have followed *U. S. v. Standard Oil Company of Calif.,* 332 U.S. 301, and *Feres v. U. S.,* 340 U.S. 135, and have concluded in accord with language therein that the issue of "scope" of

employment of governmental military personnel is one governed by federal law. No adequate reason is given why this would not also be as true of civilian personnel as military personnel.

It is apparent, however, that this Court in those cases was speaking of rights and duties between the government and members of the armed forces *inter sese*. The Court must not have contemplated the use of these cases to read out of the Tort Claims Act the provision on what law is to apply in actions under the Act. This is illustrated by a review of the actual questions involved in each of them. In the former case the question was whether the government might, in the absence of statute, sue for indemnification from defendant for the expense of care of a soldier injured by defendant's truck. This Court said that any liability would have to be determined by federal statute, and there was none. In so doing the Court made this statement:

> "To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority."
>
> 67 S.Ct. 1607.

This language is quoted in *Feres v. U. S.*, 67 S.Ct. at 158, in a case involving the liability of the government to a soldier, likewise rights and duties, *inter*

sese. Neither holding deals with scope of employment. Neither holding deals with the vicarious liability of the government to third persons. In fact, the language in the *Standard Oil* case suggests that the scope of the relation of soldier to civilian may not be governed by federal law. In any event, it is clear that federal laws and regulations do not, *under the Tort Claims Act,* control the determination of scope of employment of soldiers. The Act provides, and petitioner contends, that state rules of *respondeat superior* must govern.

The danger of a contrary holding is amply illustrated by the case at bar, and also by *Watt v. U. S.,* 123 F. Supp. 906 (E.D. Ark. N.D. Sept. 13, 1954), and *McConville v. U. S.,* 197 F. (2d) 680 (2d Cir. 1952). Each of these cases results in a holding contrary to practically universal substantive law of *respondeat superior.*

In the case at bar the lower courts refused to consider the effect of petitioner's evidence that the soldier-driver here followed the prevailing custom, the usual channels, the standard operating procedure, in seeking personal recreation by driving the vehicle and also by driving to and from a non-commissioned officer's recreational club, by obtaining an official pass for recreation, by obtaining the usual military vehicle trip ticket, by obtaining the vehicle from the motor pool, and by checking out the vehicle at the dispatcher's office when he left the base. Finding that this procedure and custom violated another army regulation, the courts refused to consider these factors

in determining whether the soldier was acting in the course of his military employment; or, considering the violation, found that it was conclusive on the issue. But, as is more fully developed below, either alternative was unwarranted.

Some of the tests under the substantive law of respondeat superior for determining the issue of scope of employment are: (a) whether or not the act is "one commonly done" by such servants; (b) the "previous relations" between the master and the servant; (c) whether or not the master has "reason to expect that such an act will be done;" (d) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (e) the extent of departure from the "normal method" of accomplishing an authorized result. *Rest. Agency,* Sec. 229. Petitioner's evidence, of course, pertained to and more than fully met some, if not all, of such tests.

The danger and inequity of holding that these cases are governed by federal rules and regulations, and of disregarding evidence of custom is graphically illustrated by the other two recent cases. In *Watt v. U.S.,* 123 F. Supp. 906 (E.D. Ark. N.D. Sept. 13, 1954) a national guard company's "unit administrative assistant" drove a truck to the headquarters of a United States property disbursing office for the purpose of delivering to him clothing formerly issued to the company and to draw additional supplies and equipment. This was obviously a governmental purpose. His passenger was the "unit caretaker" of the

company. Both were sergeants first class. Had the passenger been driving the truck, there would have been no question but that he was acting within the scope of his employment. But, the Court found that certain compartmentalizing regulations of the army prescribed different administrative duties for the driver. The Assistant Adjutant General for Arkansas testified, nevertheless, that the duties of an "administrative assistant" and "unit caretaker" customarily overlapped in *practice*. But the Court held that the *regulations* were the boundaries of the driver's scope of employment, that the usage and custom of the driver's unit would not extend the scope of the driver's employment. In *McConville v. U. S.*, 197 F. 2d 680 (2d Cir. 1952) a result was reached quite opposite to the result reached by the Ninth Circuit below, and yet there were very similar facts. In that case the government proffered testimony that the driver of the army truck had procured the truck for the purpose of drinking beer off the base which he did do. The Court held the testimony immaterial noting that "proper authorization for a trip whose *claimed* purpose was permitted by *regulations* was all that needed to be established." (p. 684) (Emphasis added). In other words, the driver had procured a "proper" trip ticket for what must have been an improper and non-governmental purpose. Thus we have the rather ridiculous comparison of the case at bar, where the tort-feasor was acting honestly, in accordance with long established practice and custom in securing an "invalid" trip ticket, and the *McConville* case, where the tort-feasor used fraud in secur-

ing a "valid" trip ticket. In the former case the Court of Appeals has found no liability. In the latter case the Court holds that this fraudulent intent is immaterial!

These anomalous results prove that Congress did not intend that federal law and decisions should govern the determination of the issue of "scope" of employment. For it is a well-known rule of statutory construction that a statute must be construed reasonably so as to aid the design and intent of the legislature. This Court has gone even further; in the *Yellow Cab* case, supra, this Court held that this very statute must be liberally construed. So Congress, in waiving immunity, should not be said in one breath to have waived liability and then in the other to have authorized administrative agencies through federal regulations to clothe the government with immunity. If federal regulations form the bounds of the employee's scope of employment, the result is that no matter what might be his course of employment *in fact,* the government may be held free of liability because the administrative agency has rules and regulations bounding the scope of his employment *by fiction,* regardless of the governmental purpose being served or of the right of control. And if this is so for the soldier's acts, why not for the civilian's acts? Congress cannot have so intended. It provided that the law where the tort is committed shall apply. And, more important, it said *nothing* of applying a *different* law for members of the armed forces.

II. UNDER NORMAL RULES AND TESTS OF RESPONDEAT SUPERIOR THE RECORD ON THE ISSUE OF SCOPE OF EMPLOYMENT IS UNCONTRADICTED AND DOCUMENTARY. THIS COURT SHOULD DECIDE THESE QUESTIONS IN PETITIONER'S FAVOR AND LEAVE THE DETERMINATION OF THE ISSUE OF DAMAGES TO THE TRIAL COURT.

A. Since the Specific Act of Driving the Army Vehicle for Recreation Was Itself an Authorized Act, the Soldier's Negligence in Performing That Act Gives Rise to Governmental Liability.

Petitioner asks this Court to view the bare facts of the record in the light of the actualities of military service overseas upon Guam at the time of the accident. The Island of Guam is 32 miles long and 4 to 10 miles wide. It is located at least 6,000 miles from the homes of most military personnel stationed there. The military considered the soldier there to be on duty 24 hours a day. Evidently, morale was considered such an important problem that soldiers were individually permitted, by going through customary channels, to use military vehicles for recreational purposes.

These facts illustrate what this case is not. This is not the case where a soldier is on "Stateside" pass seeking "Stateside" pleasures. This is not anything like the case where a soldier on leave in the United States uses his own automobile to go to and from his home, as in *U.S. v. Eleazer,* 177 F. 2d 914. This is not the case where a flier makes unauthorized use of an airplane in the United States and causes personal injuries to plaintiff, as in *King v. U. S.*, 178 F. 2d 320 (CA 5).

This *is* a case like *Murphey v. U. S.*, 179 F. 2d 743 (9th Cir. 1950), and cases and analogies therein cited.

1. In the Factual Context of This Case the Soldier in Using the Vehicle for His Own Recreation Was in Part Serving Governmental Purpose. The Well-Reasoned Case of Murphey v. U. S., is Direct Authority to That Effect. Thus, the Evidence Herein Meets the Ultimate Test of Scope of Employment.

California law (which respondent concedes to be applicable here [Brief in Opposition to Petition for Writ, p. 7, Fn. 6]) states the applicable rule as follows:

> "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but *the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master.*"
>
> *Ryan v. Farrell,* 208 Cal. 200. (Emphasis added).

Concededly the soldier-driver in the instant case was pursuing authorized recreation in driving the army vehicle. But in accordance with the above rule, this does not end the inquiry. The facts of this particular case present more than the traditional "frolic" situation. This is borne out by the *Murphey* case, *supra.*

In *Murphey v. U.S.* the Ninth Circuit held that under proper facts a soldier's recreational pursuits in a government provided vehicle may be held to

have been within the scope of employment. The facts there presented were as follows. A soldier-driver was stationed with about twenty other men at an *isolated encampment* in Northern California. In order to keep up the *morale* of the men the commander provided an army truck for nightly visits to Klamath for "entertainment, movies, etc." On the night in question, the soldier-driver took the men to town and parked the truck at a designated location. The commanding officer testified that the soldier-driver was not free to use the truck again until such time as the group was ready to return to the encampment. Nevertheless, the soldier-driver and a buddy visited a saloon, returned and got the truck, started toward a nearby Indian ceremonial, and picked up two women along the way. During the trip the truck hit a pedestrian and killed her. The United States District Court found that the soldier was not acting within the scope of his employment because the vehicle was not to have been moved and was not to have been used for personal pleasure. But the Court of Appeals for the Ninth Circuit reversed, holding:

> "The government brief concedes that Brander was acting within the scope of his employment in driving himself and other soldiers into the town of Klamath for their recreation, but contends that such recreational employment of the truck by the sergeant alone could not be a military employment. We do not agree. Improvement of morale of a single soldier is as much military in character as of several . . ." (p. 745).

* * * * * * *

"We think the overriding *purpose* in Brander's employment in the use of the truck in the town of Klamath is the *improvement of the morale* of soldiers in seeking 'entertainment.' The 'movies, etc.' certainly would include the Indian Ceremonial. The government being liable as a private person in California, it is liable where the truck was in use for the broad purpose for which it was employed by Brander, even though he had instructions that he was not 'free' to use it in a particular manner accomplishing that purpose . . ."

* * * * * * *

"Here Brander was seeking the specified entertainment which would improve his military morale. That he was 'directly or indirectly serving his master' in so doing is none the less within the scope of that employment, because he was serving his own desire and that of the other sergeant seeking recreation in taking the latter's two lady friends to the Ceremonial."

The *Murphey* case, and the cases and analogies cited therein, realistically apply the rule of *respondeat superior* to problems of the military. It may be stated as follows. When the type of employment is such that the employee is almost constantly under the employer's wing; when the employee is peculiarly isolated from the usual recreational pursuits; when the employer has unusual control over the hours, area, or instrumentality in which off-time is spent; and when, because of the monotony of the employment, the employer is of necessity directly concerned with the morale and recreation

factor, the "scope of employment" is broadened to include recreational activities. And this is so as much for an individual employee as it is for several.

This is no novel proposition. As the Court in the *Murphey* case said:

> "In an analogous case of seamen held to the monotony of the ship, as these soldiers were to that of their mountain camp, this court in the same division of judges has held that, in seeking allowed recreation, the seaman was in the course of his employment when at a shallow swimming pool he was injured in a dive."
>
> *Ellis v. American Hawaiian SS. Co.* (9 Cir.), 165 F. 2d 999, 1001.

> "In that case we relied upon *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107, in which this court stated:
>
> "The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew could be taken if it could never obtain it. Even more for the seaman than for the landman, therefore, 'the superfluous is the necessary . . . to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the

business as old as the art, not merely a personal diversion."

Even under state law, where the factual situation here presented can rarely arise, it has been said:

"Similarly it is held that employees are in the course of their employment while properly spending their time, when off duty, in a bunkhouse furnished by the employer and in which they are compelled to live."

27 *Cal. Jur.*, 393, Workmen's Compensation, Section 90.

See also:

Larson v. Industrial Accident Commission, 193 Cal. 406;

State Compensation Insurance Fund v. I.A.C., 194 Cal. 28;

Employer's Liability Assurance Corp. v. I.A.C., 37 C.A. 2d 567;

Union Oil Co. v. I.A.C., 211 Cal. 398;

Truck Insurance Exchange v. I.A.C., 27 C. 2d 813;

Pacific Indemnity Co. v. I.A.C., 26 C. 2d 509;

West v. I.A.C., 79 C.A. 2d 711;

Jiminez v. Liberty Farms Co., 78 C.A. 2d 458;

Pacific Employer's Ins. Co. v. I.A.C., 77 C.A. 424.

Any doubt that providing vehicles for the recreation and the improvement of morale of an individual soldier is a governmental, military purpose, is conclusively answered by the interpretations of the Judge Advocate General *on the very*

issue of scope of employment in administering claims against the United States. These interpretations of the law by the administrative officials of the military are entitled to great weight. *Hironimus v. Durant,* 168 F. 2d 258 (4th Cir. 1948).

In SPJGD/D-205711, March 1946, the Judge Advocate General said:

> "The use and operation of passenger and cargo motor vehicles are among the most common activities of our time. Claims arising from the use of such vehicles by the War Department and the Army constitute the largest single category (about 48%) of claims processed administratively by the War Department. Such claims normally fall within the provisions of paragraph 4c and negligence or otherwise tortious acts on the part of military personnel or civilian employees of the War Department acting within the scope of their employment form the basis of liability on the part of the Government and are prerequisites to approval and payment . . ."

In so administering the Act the Judge Advocate General has allowed the claim where an army driver caused damage while coming back from the post exchange during his rest period (SPJGD/D-99994, 18 August 1945). And in SPJGD/D-100463, 25 August 1945, a claim for personal injuries was allowed because of the negligent driving of an army truck driver who was drunk and yet was authorized to transport girls home from an army dance. In deciding such cases, the military followed Army Regulations 25-70, which adopted normal rules of *respondeat superior.* This regulation provided in part:

"These activities of military personnel . . . ordinarily are within the scope of employment . . . if the purpose is, at least in part, to serve the government . . . In determining whether conduct, although not expressly authorized, is nevertheless within the scope of employment, consideration may be given to all the attendant facts and circumstances, including the time, place, and purpose of the activity; whether the activity was for the furtherance of the general interests of the government; whether the activity is usual for personnel of the grade and classification involved or reasonably to be expected of such personnel; and whether the instrumentality from which the damage or injury resulted was owned or furnished by the government."

2. The Soldier-Driver Here at All Times Was Under the Control and Subject to the Right of Control of the Military, Even While on Pass. The Evidence Thus Meets the Ultimate Test of Liability Under Respondeat Superior.

The California Court has said:

"The essential characteristic of employment relationship is the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed . . . Existence of the right is often tested by determining whether, if instructions were given, they would have to be obeyed."

Villanazul v. City of Los Angeles, 37 Cal. 2d 718, 721.

This rule is in accord with general agency law. Thus the *Restatement of Agency,* Sec. 228, Comment a, states that the "scope of employment" is the field

of action within which one *is* a servant, and in Sec. 220 defines servant as "one employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is *subject to the other's control or right of control.*"

Petitioner contends that of all types of servants, the soldier-driver here, surrounded as he was by rules, order, regulations, military police, more than meets this test, even while on pass.

The Ninth Circuit in the instant case held that the soldier-driver was on authorized recreational pass away from his post, seeking recreation, and concluded that therefore he could not have been acting within the scope of his authority. But, this is patently incorrect. The *Murphey* case involved a soldier on pass away from his post. Army decisions, some cited above, involve soldiers on pass away from their post. In fact, if the premise is accepted that pursuit of recreation may be activity within the scope of employment, then the fact that such pursuit is further authorized by the granting of a pass merely *bolsters* rather than detracts from a conclusion of liability. Especially on an isolated Army station.

The statements in the Ninth Circuit opinion to the effect that a soldier on pass is at liberty to go where he will and do what he pleases, that leave is a favor extended for his sole accommodation, that a soldier "off duty" is subject to the control of no one but himself (R. 181-182) cannot go unanswered. These, as anyone familiar with military life knows,

are fictions. The soldier on pass, especially at a small overseas post as here, is never beyond the reach of military control. For example, the trip ticket issued to the soldier-driver here required him to return by a certain hour, as did his pass. The accident occurred within the authorized time. Army control governed practically his every action. There are ever-present military police to enforce these regulations.

Even in the United States, his off-time activities would be controlled by the military. There are places off-limits and out-of-bounds where he could not have gone. *Harper v. Jones,* 195 F. 2d 705. Were he a minor in Bainbridge, Maryland, he could not drink alcoholic beverages. Op JAGN 1954/205, 2 March 1954. Were he a professional athlete, he could not have engaged in professional athletics. JAGA 1953/718. And were he but a stockholder in a corporation, he could not even have accepted appointment to a board of directors! JAGA 1952/2573, 19 March 1952.

Certainly it must be said that the soldier-driver at all times was subject to control and the right to control. Were he given orders he would have had to obey them. And the proof of the pudding is that this very soldier-driver was restricted to his post the day following the accident (R. 15).

3. The Fact That the Soldier-Driver Negligently or Wrongfully Performed the Authorized Act of Driving for Recreation Does Not Relieve the Government of Liability.

Admittedly the soldier-driver in the instant case was driving the weapon's carrier negligently. Ad-

mittedly he was driving the vehicle while drunk. But neither of these facts takes his act outside the scope of employment. The doing of an authorized act in a wrongful or prohibited manner will not preclude responsibility of the employer. *Restatement of Agency,* Sections 230, 229; *Fields v. Sanders,* 29 Cal. 2d 834, 839; *Haworth v. Elliott,* 67 C.A. 2d 77, 81; *Hiroshima v. Pacific Gas and Elect. Co.,* 18 C.A. 2d 24. This is elementary law. There would be no cause for vicarious liability unless a wrong had been committed. No sane employer would authorize his servants to commit wrongs, yet they are committed and once committed the employer may be held liable.

> "The test is not whether the wrongful act itself was authorized but whether it was committed *in the course of a series of acts of the agent which were authorized by the principal* and while the agent was still occupying himself with the principal's business within the scope of his employment." (Emphasis added.)
>
> *Deevy v. Tassi,* 21 Cal. 2d 109, 125.

Thus, the master may be liable for the negligent or drunken driving of his servant.

> "It is true that a master would not be exonerated on the theory that his servant was not employed to get drunk and therefore departed from the scope of his employment in doing so. To the contrary, drunkenness on the part of the agent is an act of negligence for which his employer becomes liable, if the servant otherwise is acting within the scope of his employment."
>
> *Christian v. U. S.,* 184 F. 2d 523, 525 (6th Cir. 1950).

B. Even If the Soldier-Driver's Authority to Drive Was Limited to Transportation to and From Government-Provided Recreation Facilities, His Acts Were Within His Scope of Employment.

The lower courts here in their zeal to relieve the government of liability have confused two distinct aspects of the soldier-driver's authority. The evidence is that *the mere driving for recreation was authorized* (R. 134, 127). Talk in the lower courts' opinions on "frolic" is completely inappropriate where the so-called "frolic" is the negligence in performing the very act authorized, namely, merely driving the vehicle. But there is another aspect of authority,—the authorized use of the vehicle in going to and from government-provided recreational facilities—the NCO Club. Talk of "frolic" may be more appropriate if the soldier-driver's authority was thus limited. But even then, under the rule of *Murphey v. U. S.*, 199 Fed. 2d 743, *supra,* his acts were within the scope of employment. No material distinction exists between that case and the instant case.

The dissenting judge in the *Murphey* case wrote for the Court in the case at bar. He felt that the *Murphey* case involved the question of whether the negligent act was committed while engaged in such a deviation from employment, *i.e.,* frolic, as to relieve the government of liability. Petitioner contends that, so considered, the *Murphey* case is even stronger authority for her position here, since the Court's distinctions are immaterial. The Court below sought one distinction in the fact that unlike Corporal Seabourn, the army driver in the *Murphey* case was acting under

"specific authorization of his commanding officer" to take the truck into town "for pleasure under instructions" for "entertainment, movies, etc.", another that the majority of the Court thought that the "official permission" thus granted was broad enough to include a visit to an Indian dance being held a short distance outside of this town and that this was "digression", another that "it was not contended that he was drunk at the time, or that drinking contributed in any way to his negligence", another that the soldier-driver there was seeking "specified entertainment", another that the soldier-driver's superior officer knew that as incidental acts the truck was employed to reach places of entertainment outside of Klamath. In the case at bar there is evidence that the use of army vehicles for "recreation" to go to the NCO Club and elsewhere and back to post had been a long established practice indulged in by all members of the soldier-driver's post, officers included. It is a certainty that his superior officers, specifically Lt. Werb, knew of this long established custom. Moreover, the *Murphey* case truck driver had visited a saloon. For what purpose other than drinking? Indeed he had picked up two lady friends as passengers! The District Court in the *Murphey* case found that special permission was required to use the vehicle for the pleasure of the men to go to any place other than Klamath, and the truck driver was not authorized to operate the vehicle for his use or for any other use than that of driving to Klamath and parking the vehicle by the side of a building. Here,

likewise, it is claimed that regulations governing the use of the vehicle were violated. Finally, where the court below emphasized that the government in the *Murphey* case was held liable because the truck was used for the "overriding specific purpose" of improving the morale of soldiers in seeking "entertainment, movies, etc.", even though the truck driver had instructions that he was not free to use it in a particular manner accomplishing that purpose, the similarity between the *Murphey* case and the instant case is startlingly apparent. In the case at bar the soldier-driver was authorized to use the vehicle for "recreation". Petitioner can find no distinction between "entertainment" and "recreation", or "movies, etc." and "recreation". The soldier-driver here was seeking, specifically, "recreation". If the *Murphey* case truck driver was not on such a frolic as would preclude liability, then neither was Corporal Seabourn.

C. The Uncontradicted Evidence of Custom and Practice Conclusively Establishes the Authority of the Soldier-Driver in the Two Respects Here Relied on: (1) Authority to Drive the Vehicle Itself for Recreation; (2) Authority to Drive the Vehicle To and From Government-Provided Recreational Facilities. This Custom and Practice Also Proves That Any Violation of Army Regulations Did Not Affect That Authority.

The uncontradicted evidence herein is that the soldier-driver followed the usual channels and procedure by obtaining an official pass for recreation, obtaining the usual trip ticket, obtaining the vehicle from the motor pool, and checking out the vehicle at the dispatcher's office when he left the base. All the

men in his outfit followed a long established custom of passing around trip tickets for vehicles and using the vehicles for recreation, officers included. The driver's own superior officer, Lt. Werb, followed this custom (R. 131, 139). This custom, though perhaps in technical violation of certain army regulations, was proof and conclusive proof, of Corporal Seabourn's authority (1) to drive the vehicle for recreation and (2) to drive the vehicle to and from government-provided recreational facilities and elsewhere.

Certainly this evidence was relevant. In determining whether injuries arise out of or in the course of employment under the Workmen's Compensation Act, the California Court has said:

> "In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, *the custom and usage* of a particular employment . . . should be considered."
>
> *Employers' Etc. Corp. v. IAC,* 37 C.A. 2d 567, 573.

Actual authority in agency under California statute is "such as a principal intentionally confers upon the agent, or intentionally, or *by want of ordinary care, allows the agent to believe himself to possess.*" *Calif. Civ. Code,* Sec. 2316.

Thus, if the agent or servant over a long period of time adopts a practice, and the principal through indolence or neglect permits the practice, the agent may assume that he has the authority and approval of his

principals so to act. This is actual authority, sufficient to bind the principal in the tort of fraud. *Vertex Inv. Co. v. Schwabacher,* 57 C.A. 2d 406, 418. That was done in the instant case.

Undoubtedly the trial court committed error in failing even to consider the evidence of custom. In the *Murphey* case, supra, the Court in holding for the plaintiff did look to testimony that there had been at prior times permission to use the truck for recreation in places of short distance outside of Klamath, with the knowledge of the driver's superior officer. This is evidence of custom and practice. And the Army itself in several decisions on scope of employment has likewise looked to custom. In SPJGD/D-53973, 29 January 1945, a soldier having no driver's permit was detailed to wash army cars on a wash rack. While attempting to drive one of the vehicles onto the rack he was forced by traffic to circle the block. He negligently hit a pole which fell onto the claimant's vehicle. Held: The driver was carrying out a *daily custom* of moving vehicles for a purpose beneficial to the government and the act, therefore, was within the scope of his employment. In SPJGD/D-99994, 18 August 1945, where the army driver drove to the post exchange during his rest period, the Judge Advocate noted that the post exchange was at the other end of the post and that *it was customary* for drivers to drive there in their trucks during rest periods. The soldier parked the truck at the rear of the post exchange, as he and other drivers were *accustomed* to do with the knowledge

of their immediate superiors. The drivers were not authorized to park there. Held: The rest period did not take the driver outside the scope of employment; nor did his action in parking the truck which was a well known procedure of long standing. Even if the driver's action were regarded as a violation of standing instructions, it was not such disobedience to authority or radical departure from authorized activities as to place him outside the general scope and purpose of his employment.

While it may appear that certain army regulations governing the use of vehicles were violated by the practice authorized on Guam, as held by the Ninth Circuit, and that the acts pursuant thereto were not authorized, yet this custom and practice itself proves that the acts fit within an exception actually contemplated by the regulations! And even if there were a violation, this does not affect the authority actually given. The evidence here is that Lt. Werb himself participated in and thus must have authorized the so-called "loose post practice" (R. 131). In such event the situation is similar, if not precisely the same, as the situation in *Cannon v. U. S.*, 188 F. 2d 444 (9th Cir. 1951). The *Cannon* case was an action for alleged malpractice in an army hospital. The trial court dismissed the action on the ground that the Commanding Officer of the hospital erroneously had admitted the plaintiff, a civilian, had violated Army Regulations, and, therefore, his and his subordinate's acts could not be within the scope of their employment. The appellate court, however, reviewed the ap-

plicable army regulation, found that it had indeed been violated, in that the disease for which the plaintiff was treated was not therein specified for army treatment, but concluded as follows:

> "We are of the opinion that this testimony, coupled with the official record stating the source of appellant's admission, was prima facie evidence (unrebutted in the record) of *an administrative finding of fact,* namely that this civilian was suffering from a type of disease specified in Regulation 6b(13). Keeping in mind the evidence and the presumption of regularity in the performance of official duty, it is inferable that the finding was made by Colonel Smith, the command-officer of the hospital. *The factual determination was one which the regulations authorized the officer to make, hence his action in making it was obviously within the course and scope of his authority.* This we think would be true, though, in view of the court, the officer was in error in his appraisal of the nature of the affliction from which this civilian employee was suffering. A different situation would be presented if the Regulations altogether excluded civilian employees as patients (Emphasis added).

Like the Officer in the *Cannon* case, Corporal Seabourn's superior officer was also vested with authority to make findings with respect to operation of the vehicles under his command. AR 700-105(19) provides:

> "Each commanding officer is responsible for the vehicles under his direction. He is responsible for the proper operation of vehicles and the performance of prescribed organizational maintenance."

AR 700-105(28) poses situations for factual findings respecting the use of such vehicles:

> "28. Special uses. Motor vehicles when available without detriment to *other* official business . . . may be used by special direction of the commanding officer for the following purposes:
>
> * * * * * * *
>
> "b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized, organized, and supervised recreational, welfare, and morale-building activities."

As in the *Cannon* case, Lt. Werb, in permitting the custom under his command, if not expressly, then at least impliedly, found that the transportation of soldiers to and from the N.C.O. Club on Guam was in connection with an organized, supervised recreational and morale building activity, namely, the government-provided and supervised Non-commissioned Officers Club. Like the *Cannon* case, this case might have been different if Army Regulations altogether had excluded the use of army vehicles for recreational activities. But they did not.

Furthermore, liability under respondeat superior may rest upon the conduct of the servant "incidental to the conduct authorized." *Rest. Agency,* Sec. 229.

> "An act may be incidental to an authorized act, although considered separately it is an entirely different kind of an act. To be incidental, however, it must be one which is subordinate to or pertinent to an act which the servant is employed to perform. It must be within the ultimate objec-

tive of the principal and *an act which it is not likely that a servant might do . . .*"

Rest. Agency, Sec. 229, Comment b.

As the Court held in the *Murphey* case, *supra,* it is only reasonable to conclude that the recreational use of an army vehicle by a single soldier is one such act "incidental" to the expressly authorized use of vehicles for organized recreational activities. It certainly is an act which it is not unlikely that such a servant might do in going to and from an N.C.O. Club. It was, in fact, done here.

Even the army does not sanctify its orders and regulations to the extent that the Ninth Circuit has done below. In the Post Exchange Army decision, SPJGD/D-9994, 18 August 1945, and in the Driving Without Permit Army decision SPJGD/D-53973, 29 January 1945, supra, liability was administratively fixed by the army upon the government, even though orders had been disobeyed.

But even assuming that army regulations were violated, the government is not thereby freed of liability. Thus, in the *Murphey* case, *supra,* disobedience of standing orders to leave the truck parked in Klamath did not serve to put the driver's acts outside the scope of employment. And indeed to hold that army regulations bound the scope of a soldier's employment would limit government liability to a ridiculous extent. For example, violation of the Army Regulation against drunk-driving would, *ipso facto,* place the negligent act outside the scope of employment. Such a theory

runs directly contrary to applicable substantive master and servant law:

> "An act although forbidden or done in a forbidden manner, may be within the scope of employment." *Rest. Agency,* Sec. 230.

D. Since the Evidence Is Uncontradicted and Documentary, This Court May Make Its Own Determination on the Issue of Scope of Employment.

Ordinarily, of course, the issue of scope of employment is a "question of Fact," and rules of appellate review ordinarily inhibit the appellate court from redetermining such questions. This, however, is not the case here. Just as the Ninth Circuit reversed the unjust decision of the trial court in *Murphey v. U. S.,* 179 Fed. 2d 743 (9th Cir. 1950), so this Court may do here.

As the Court said in *Murphey v. U. S.:*

> "The entire evidence is in two depositions of witnesses taken by the United States and hence warrants our own consideration of its probative value, with due respect to the findings of the court below. *Equitable Life Assurance Soc. v. Irelan,* 9 Cir., 1941, 123 F. 2d 462, 464; *Smith v. Royal Insurance Co.,* 9 Cir., 1942, 125 F. 2d 222, 224, certiorari denied 316 U.S. 695, 62 S.Ct. 1291, 86 L.Ed. 1765; *Stork Restaurant, Inc., v. Sahati,* 9 Cir., 1948, 166 F. 2d 348."

III. THE ACTS IN LINE OF DUTY OF RELEASING TO A DRUNKEN SOLDIER AN ARMY VEHICLE CONSTITUTED IN THEMSELVES SUCH NEGLIGENCE AS TO IMPOSE LIABILITY UPON THE GOVERNMENT.

The California Court has aptly said:

> "The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment . . . Such injuries are one of the risks of the enterprise . . ."
>
> *Carr v. Wm. C. Crowell Co.*, 28 C. 2d 652.

In the words of the Restatement:

> "Since the phrase 'scope of employment', is used for the purposes of determining the liability of the master for the conduct of servants, the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."
>
> *Rest. Agency*, Sec. 229, Comment a.

Here petitioner was seriously and permanently injured by reason of the drunk driving of Corporal Seabourn. She suffered lacerations (R. 35), fractured transverse processes of three vertebrae (R. 39), scarring and restricted motion of her right leg (R. 35-36), recurring and persistent headaches, pain in

the chest, back ache and chronic back strain, uncontrollable trembling and shaking of the muscles of her legs' functional involvement, all resulting in a loss of 35% of her ability to do general work (R. 40). These conditions are permanent (R. 39), and involve, and would involve, further surgery and treatment resulting in medical expenses alone of over $2,000.00 (R. 39).

It is not just that she alone be forced to bear this loss. There is more than one avenue of governmental liability. The entire practice of issuing vehicles for recreation, the practice, specifically, of issuing to a soldier who had been drinking all day, the vehicle here involved is one interrelated tortious transaction. If Corporal Seabourn was not acting "in line of duty" at the time of the accident, then surely the dispatcher in issuing him the vehicle was acting "in line of duty", and Lt. Werb in authorizing the use was acting "in line of duty". Petitioner feels that issuing to a soldier already drunk a vehicle for transportation to a club where further drinking may be indulged in; and, even more, letting loose a drunk Army driver in an Army vehicle upon the highways of Guam were such culpable acts as themselves impose liability upon the government. The government, like any corporate body, can only act by and through its agents and servants. With its vast resources and powers of discipline and control up and down the lines of command, the government should bear the responsibility for what is clearly not one, but a series of acts of negligence which it had and has the power to curb and prevent.

CONCLUSION.

For the reasons foregoing petitioner prays that th Court give judgment in her favor and remand to t trial court the determination of damages. Failing th petitioner prays that the entire judgment be revers and remanded for retrial consistent with a corre interpretation of the Tort Claims Act.

In any event petitioner prays for her costs in th proceeding. Because of her impecuniousness pet tioner was forced to proceed before the Court of A peals by way of typewritten brief (R. 56). Relyi as she has upon direct authority in her circuit, *Mu phey v. U. S.*, 179 F. 2d 743, and relying upon th denial of the government's motion for summary jud ment, petitioner has seen only mounting costs of li gation and the belated disavowal by the circuit o the *Murphey* case. Her damages and impecuniousn continue. Her appeal to this Court was made possib only by advancement of some expenses by her cou sel. And since the interpretation of the Act is a ma ter of nationwide concern, important to all the peop of the United States, it is felt the costs of that inte pretation should be paid by their government and re payment made to petitioner's counsel of expens advanced.

Dated, San Francisco, California,
July 11, 1955.

Respectfully submitted,
HENRY C. CLAUSEN,
Attorney for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	7
Argument:	
I. Federal liability under the Tort Claims Act extends only to torts of federal employees acting within the scope of their employment	12
A. The plain terms of the Act	12
B. The same standard of federal liability, based on the *respondeat superior* principle, applies to torts of military and civilian personnel of the Government	14
II. Cpl. Seabourn was not acting within the scope of his employment when, while on pass, he obtained unauthorized possession of the military vehicle and went joy riding in it	26
A. *Respondeat superior* liability is imposed only where the servant is engaged in his master's business and is subject to his control at the time of the accident	26
1. Cpl Seabourn was not on Government business at the time of the accident	27
2. The Government had no right to control Seabourn in the performance of the negligent act which caused the injury	28
3. The "recreational activity" label, placed by petitioner on	

Argument—Continued

Page

Seabourn's unauthorized use of the military vehicle for drinking and joy riding, does not bring it within the scope of his employment..... 30

B. Federal law governs the issue of "scope of employment" but the facts here prevent such a finding irrespective of whether state or federal law applies 35

C. The United States would not be liable for Cpl. Seabourn's tort even if there were applied the broad "line of duty" test, the workmen's compensation test, or the "service of the ship" test 38

1. The broad "line of duty" test.. 39

2. The "workmen's compensation" test 40

3. The "service of the ship" test.. 42

III. Federal liability under the Tort Claims Act may not be predicated on Government ownership of the vehicle driven by Seabourn.... 43

A. Government ownership of a vehicle does not subject the Government to liability 44

B. There was no negligence in allowing Seabourn to take possession of the vehicle 47

Conclusion 48

Appendix 49

CITATIONS

Cases:

Adams v. *Quality Service Laundry & Dry Cleaners*, 253 Wisc. 334 31

Aguilar v. *Standard Oil Co.*, 318 U.S. 724..... 42

Allen v. *The B., C.R. & N. R. Co.*, 57 Iowa 623.... 16

Atlantic Cleaners & Dyers v. *United States*, 286 U.S. 427 15

Cases—Continued

	Page
Baker v. *United States*, 127 F. Supp. 644	22
Beatty, Appellant v. *Firestone T. & R. Co.*, 263 Pa. St. 271	31
Ben Flint, The, 3 Fed. Cas. No. 1299	43
Board v. *Hearst Publications*, 322 U.S. 111	27
Boston Sand Co. v. *United States*, 278 U.S. 41	16
Brady v. *Chicago and G.W. Ry. Co.*, 114 Fed. 100	27
Brooks v. *United States*, 337 U.S. 49	16, 29
Burgess v. *Cahill*, 26 Cal. 2d 320	44
Cardillo v. *Liberty Mutual Co.*, 330 U.S. 469	14, 41
Casey v. *Fortune*, 78 Cal. App. 2d 922	44
Conversions & Surveys v. *Roach*, 204 F. 2d 499	27
Craige v. *Austin Powder Co.*, 91 F. 2d 664	27
Cropper v. *United States*, 81 F. Supp. 81	22, 47
Cudahy Packing Co. v. *Parramore*, 263 U.S. 418	14
DuBois v. *Owen*, 16 Cal. App. 2d 552	47
Emery Motor Livery Co. v. *Indus. Com.*, 291 Ill. 532	42
Farwell v. *Boston and Worcester Railroad Corporation*, 4 Metcalf 49	26
Feres v. *United States*, 340 U.S. 135	19, 29, 36
Fiocco v. *Carver*, 234 N.Y. 219	9, 26
Foster v. *United States*, 43 C.Cls. 170	29
Fries v. *United States*, 170 F. 2d 726, certiorari denied, 336 U.S. 954	22, 47
Gewanski v. *Ellsworth*, 166 Wisc. 250	31
Greenwood v. *United States*, 97 F. Supp. 996	22
Harrington v. *Border City Manuf. Co.*, 240 Mass. 170	31
Hubsch v. *United States*, 174 F. 2d 7, writ of certiorari dismissed, 340 U.S. 804	47
Hunt v. *United States*, 38 C.Cls. 704	29
Jackson v. *United States*, 196 F. 2d 725	47
Johnson v. *Esso Standard Oil Co.*, 211 F. 2d 397	27, 37
King v. *Anthony*, Canada Law Reports (S.C. 1946) 569	23
King v. *United States*, 178 F. 2d 320, certiorari denied, 339 U.S. 964	28

Cases—Continued

	Page
Kish v. *California State Automobile Assn.*, 190 Cal. 246	37
Krum v. *Malloy*, 22 Cal. 2d 132	47
Lee v. *Nathan*, 67 Cal. App. 111	37
Leonard v. *United States*, 131 F. Supp. 694	22
Long v. *United States*, 78 F. Supp. 35	22, 47
Loucks v. *R. J. Reynolds Tobacco Co.*, 188 Minn. 182	31
Lynch v. *Walker*, 159 Fla. 188	44
McConville v. *United States*, 197 F. 2d 680, certiorari denied, 344 U.S. 877	22, 34
Mesker v. *Bishop*, 56 Ind. App. 455	16
Mitchell v. *Cohen*, 333 U.S. 411	16
Moye v. *United States*, 218 F. 2d 81	22
Mucci v. *Winter*, 103 Cal. App. 2d 627	47
Murphey v. *United States*, 179 F. 2d 743	24, 31, 32
Norton v. *Warner Co.*, 321 U.S. 565	42
O'Connell v. *United States*, 110 F. Supp. 612	22
O'Leary v. *Brown-Pacific-Maxon*, 340 U.S. 504	41
O'Neil v. *Fred Evens Motor Co.*, 160 S. W. 2d 775	42
P. F. Collier & Son Co. v. *Hartfeil*, 72 F. 2d 625	27
Phelps v. *Boone*, 67 F. 2d 574, certiorari denied, 291 U.S. 677	27
Psota v. *Long Island R.R. Co.*, 246 N.Y. 388	13
Reilly v. *Connable*, 214 N.Y. 586	31
Roebling's Sons Co. v. *Industrial A. Com.*, 36 Cal. App. 10	42
Rogers v. *A.-C. Mfg. Co.*, 153 Ohio St. 513	31
Rutherford v. *United States*, 73 F. Supp. 867, affirmed *per curiam*, 168 F. 2d 70	22, 29
Sanchez v. *United States*, 177 F. 2d 452	22, 29, 47
Slater v. *Friedman*, 62 Cal. App. 668	37
Snodgrass v. *Hand*, 220 Cal. 446	44
So. Cotton Oil v. *Anderson*, 80 Fla. 441	44
Standard Oil Co., The, v. *Anderson*, 212 U.S. 215,	26, 27, 37
Standard Oil Co. v. *Parkinson*, 152 Fed. 681	27
Stekovich v. *United States*, 102 F. Supp. 925	22
Stenger v. *Mitchell*, 70 Ga. App. 563	31
Stenzler v. *Standard Gas Light Co. of N. Y. City*, 179 App. 774, affirmed, 226 N.Y. 681	31

Cases—Continued

Page

Texas City Disaster Litigation, In Re, 197 F. 2d 771, affirmed *sub nom. Dalehite* v. *United States*, 346 U.S. 15 45
Toms v. *Delta Savings & Loan Ass'n*, 162 Ohio St. 513 31
United States v. *Ashford*, Court-Martial Reports, JAG, Armed Forces, vol. 3, p. 201..... 40
United States v. *Campbell*, 172 F. 2d 500, certiorari denied, 337 U.S. 957.....12, 13, 18, 19, 20, 24
United States v. *Dickerson*, 310 U.S. 554..... 16
United States v. *Eleazer*, 177 F. 2d 914, certiorari denied, 339 U.S. 903 .....12, 19, 20, 23, 26, 27, 29
United States v. *Gilman*, 347 U.S. 507..... 36
United States v. *Griffith*, Court Martial Reports, JAG, Air Force, vol. 3, p. 235..... 40
United States v. *Hendee*, 124 U.S. 309..... 16
United States v. *Hull*, 195 F. 2d 64..... 45
United States v. *Johnson*, 181 F. 2d 577..... 37, 44
United States v. *Lushbough*, 200 F. 2d 717..... 22, 47
United States v. *McMains*, Court-Martial Reports, JAG, Armed Forces, vol. 9, p. 338..... 40
United States v. *Mouat*, 124 U.S. 303..... 16
United States v. *Phillips*, Court Martial Reports, JAG, Air Force, vol. 1, p. 1..... 40
United States v. *Sharpe*, 189 F. 2d 239 .....29, 35-36
United States v. *Standard Oil Co.*, 332 U.S. 301.... 36
United States v. *Williamson*, 23 Wall. 411..... 29
Warner v. *Goltra*, 293 U.S. 155..... 42
Warren v. *United States*, 340 U.S. 523..... 42, 43
Waters, Matter of, v. *Taylor Co.*, 218 N.Y. 248... 41
Williams v. *United States*, 189 F. 2d 607..... 47

Statutes and Regulations:

Act of September 27, 1944, 58 Stat. 752 (par. 8, E.O. 6098, March 31, 1933, Vet. Reg. No. 10, ch. 12A, 38 U.S.C.) 17, 39
Federal Tort Claims Act, 28 U.S.C.:
Section 1346(b) 7, 12, 45, 49
Section 2671 .....8, 14, 18, 19, 50
Section 2674 49

Statutes and Regulations—Continued

	Page
5 U.S.C. 78(c)(2)	4
Deering's Calif. Code, Veh. Code Ann. § 402 (1948)	44
D.C. Code § 40-403 (1940)	44
Idaho Code Ann. § 49-1004 (1948)	44
Iowa Code Ann. § 321.493 (1949)	44
Mich. Stat. Ann. § 9.2101 (Supp. 1949)	44
Minn. Stat. Ann. § 170.54 (1946)	44
N.Y. Veh. & Traffic Law § 59 (Supp. 1951)	44
R. I. Gen. Laws 1938, c. 98, § 10 (1938), as amended by Pub. Laws 1940, c. 867, § 1	44
Wis. Stat. § 85.01(1a)(c) (1949)	44
A.R. 600-140, par. 2	39, 40
A.R. 700-105 (30 June 1948)	31
Par. 26b	50
Par. 26c	4, 50
Par. 28	51
Par. 28a	51
Par. 28b	3, 51
Par. 29d	51

Miscellaneous:

Douglas, Vicarious Liability and the Administration of Risk, 38 Yale L.J. 584 (1929)	13
Hearings Before the House Committee on the Judiciary, 77th Cong., 2d sess., on H.R. 5373 and H.R. 6463, p. 7	19
H. Rep. 667, 69th Cong., 1st sess., p. 6, on S. 1912	19
H. Rep. 286, 70th Cong., 1st sess., pp. 6-7, on H.R. 9285	19
H. Rep. 2800, 71st Cong., 3d sess., pp. 12-13, on H.R. 17168	19
Holmes, *Agency*, 4 Harv. L. Rev. 345 (1891)	13
Larson's *Workmen's Compensation Law* (1952), vol. 1, p. 490	41
Manual for Courts-Martial, United States (1951), p. 362	40

Miscellaneous—Continued

	Page
Manual for Courts-Martial, U. S. Army (1949), p. 330, par. 159	40
32 Op. A.G. 12 (1919)	17
Restatement, Agency:	
Section 228, comment c	27
Section 229, comment c	27
Restatement, *Torts:*	
Section 500, Comment (g)	40
Section 502, Comment	40
Schneider, *Workmen's Compensation Text* (1948), vol. 6, pp. 342-351, 492	41
Smith, *Frolic and Detour*, 23 Col. L. Rev. 444	13
Veterans Administration Decision No. 715, June 28, 1946, on "Payment of Pension for Disability Incurred While on Pass (Authorized Leave) and in Private Employment," Decisions of Administrator of Veterans' Affairs, vol. 1, p. 1470	17
Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315 (1894)	13

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 24

ALTHEA G. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of California, Southern Division (R. 44-47) is reported at 105 F. Supp. 208. The opinion of the Court of Appeals for the Ninth Circuit (R. 168-182) is reported at 215 F. 2d 800.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1954 (R. 183). The petition

for a writ of certiorari was filed on December 6, 1954, and was granted on January 31, 1955 (R. 183). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Government is liable under the Tort Claims Act—which is expressly limited to injuries caused by the negligence of a Government employee "while acting within the scope of his office or employment"—for injuries caused by a serviceman who, while off duty and on pass, obtained unauthorized possession of a military vehicle and went joy riding in it.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act and the Army Regulations are set forth in the Appendix, *infra*, pp. 49-51.

STATEMENT

Petitioner, an employee of a private construction firm in Guam, sustained personal injuries when a parked auto in which she was sitting was struck by a military vehicle driven by Cpl. J. R. Seabourn (R. 51, 168). The accident occurred in Agana, Guam, at about 10:30 p.m. on March 3, 1949 (R. 51, 168).

The record and the findings of the courts below reveal that on that day Seabourn, a supply clerk assigned to a military service unit in Guam, was off duty, having obtained a pass to leave the base for the day (R. 14, 27, 51). He "did not work at

all that day" and left the base at noontime with two other servicemen, Pvt. Schmidt and Cpl. Benson[1] (R. 14, 44, 51). The three men hitchhiked and later hired a cab to go to Agana, spending the entire afternoon "drinking and running around" (R. 8, 14, 16, 22, 25, 51).

They returned to the base at about 7:00 p.m., and while there, Seabourn "picked up" a "so-called 'trip ticket' " for a ¾-ton military vehicle from a Sgt. Stiles in his unit (R. 14, 44, 170). This ticket had been made out about 8 o'clock that morning to a driver named Cabera, another serviceman who worked with Seabourn (R. 32, 28-29). The ticket "discloses that the vehicle had been requested by a Lt. W. R. Werb, and use of the vehicle was therein authorized for 'Official Business' " (R. 171).[2] Listed on the ticket are "the various official points" to which the vehicle was driven that day, *e.g.*, from the "Motor Pool" to "Base Supply," to "Warehouse 1," and to "374 Maintenance" (R. 171). As the Court of Appeals pointed out, "Neither Seabourn's nor Stiles' name appears on the ticket, nor was Seabourn's use of the vehicle in any way indicated thereon" (R. 171-172).

Seabourn testified (by deposition) that he realized that the trip ticket had been "issued for official business" and therefore knew that it did not

---

[1] Cpl. Benson was sometimes referred to as Cpl. Vincent during the trial and is so named in the opinion of the court below (R. 170, 173). It was stipulated that both names refer to the same person (R. 136).

[2] The trip ticket is set out in full at R. 32-33 and at R. 171, note 2.

cover use of the vehicle for recreation (R. 25, 28-29, 14). Moreover, he had never "check[ed] out one for recreation" (R. 29). Nevertheless, by using the trip ticket—as both courts below have held—"Seabourn obtained unauthorized possession" of the vehicle (R. 51, 172). It is true that Seabourn (R. 14, 26, 28) and Schmidt (R. 9, 12) did state that in the "service stock" section, to which they both belonged (Vincent did not belong to that unit), it was customary for trip tickets to be passed around regardless of the name of the person to whom the ticket was issued, and that, regardless of the regulations, the vehicles were used at night. Schmidt, in answer to a written interrogatory, also stated that if "there was a trip ticket the vehicle could have been used for official business or for recreation" (R. 9). But Seabourn himself, in answer to the same interrogatory, stated, "No, sir [*i.e.*, a trip ticket for a vehicle for official business could *not* be used for recreation]. I don't guess it was. I don't know whether they issued trip tickets like that or not. *I never did check out one for recreation*" (R. 28-29) (emphasis added). Similarly, Vincent's testimony was that he had "never used [Army vehicles] for recreation" (R. 21).

The trip ticket itself showed that the vehicle had been issued and used solely for "official business" on the post for the entire period before Seabourn took possession of it, *supra*, p. 3 (R. 32). Both federal statute (5 U.S.C.78(c)(2)) and Army Regulations (A.R. 700-105, par. 26*c*, *infra*, pp. 50-51) provide that motor vehicles may be used

for official business and, with the "special direction of the commanding officer," for transporting personnel in connection with "authorized, organized, and supervised recreational" activities (A.R. 700-105, par. 28*b*, *infra*, p. 51). There was no showing, and hardly a claim, of compliance with this regulation.

The courts below made no definitive or express findings on the issue of the actual custom or practice at the time (see R. 45, 51, 180). The trial court, in fact, rejected petitioner's proposed finding that Seabourn's use of the vehicle was "in accordance with the established custom and practice of the military of Guam" (R. 49). And in the court below, petitioner urged without success that the trial court had erred in failing to accept that finding (R. 55). Both courts, as already noted, found Seabourn's use of the car unauthorized.

After getting possession of the vehicle, Seabourn, Schmidt, and Benson had some more drinks and decided to go for another ride to Agana (R. 14, 16, 25, 44, 51). Some time prior to the accident, Seabourn let his companions out of the vehicle in Agana and drove off alone (R. 14, 25). There was "overwhelming evidence that Seabourn was drunk at the time" of the accident (R. 14, 19, 25, 136, 168). Seabourn remembered nothing further until the next morning, when he awoke beside a road (R. 15, 26, 45, 51).

Petitioner's complaint against the United States under the Tort Claims Act, filed on May 23, 1949, in the United States District Court for the Northern District of California, asserted that Seabourn

operated the Government-owned vehicle negligently while acting in the line of duty (R. 1). These allegations were denied in the Government's answer (R. 6). Upon trial of the case, the District Court found that the accident was caused by Seabourn's negligence (R. 51). It further found, however, that Seabourn was off duty and away from his base on a pass when the accident happened; that he had obtained unauthorized possession of the military vehicle; that he was not using it for any purpose authorized by Army Regulations, by his superior officers, or by the trip ticket; that, instead, he was on a frolic of his own, and not acting within the scope of his employment (R. 47, 51-52). Judgment was therefore entered in favor of the Government (R. 52-53).

On appeal, the Ninth Circuit reviewed the facts independently and made equivalent findings, after noting that the facts "outlined above are fully reflected in the record before us" (R. 172). The Court of Appeals found that "Seabourn's use of the vehicle while * * * 'off duty' and in quest of entertainment, was not a use in furtherance of any prescribed or indicated military duty"; that Seabourn did not use the vehicle to "serve any prescribed or noted military purpose or interest of the government"; that his use of the vehicle was not "motivated by such a purpose"; that his superior officers "had no knowledge of, or supervision over, the use of the vehicle while it was in Seabourn's possession, nor any control over Seabourn after he had secured it from Stiles"; and that no order had

been issued by any superior officer "directing or authorizing Seabourn to use the vehicle for *any purpose,* military or otherwise (including 'recreation')" (R. 172). Pointing out that a private employer would not "be held liable in damages for the tortious act of an employee occurring on an allowed 'day off' while he is out driving on a joy ride while drunk," the Court of Appeals affirmed the District Court judgment, which exonerated the Government from liability for Seabourn's negligence while "out on a wild frolic" (R. 179, 180, 183).

SUMMARY OF ARGUMENT

I

A. The only permissible basis for imposing liability on the United States in this Federal Tort Claim Act suit would be a determination that the driver of the military vehicle was acting within the scope of his employment when the accident happened. The courts have pointed out that the "heart and substance" of the Act is its requirement, in 28 U.S.C. 1346 (b), that the claim arise out of the negligence of a Government employee while acting within the scope of his employment. In incorporating the "scope of employment" requirement into the Act, Congress plainly intended to have the Government's vicarious liability for the torts of its employees measured by the conventional *respondeat superior* test, as it has developed in ordinary "common law" actions by injured third parties against

private employers. The expanded concept of "course of employment" which is used in the workmen's compensation field and in special legislation for the benefit of employees is not applicable.

B. This "common law" test applies under the Act whether the tort be that of a civilian employee, or, as in the present case, the tort of a member of the armed services.

The fact that 28 U.S.C. 2671 defines acting within "the scope of * * * employment" to mean "acting in line of duty" in case of military personnel does not mean that the area of federal liability for military torts is either broader or narrower than it is for torts of civilian employees. The history and policy of the Act and all decided cases dealing the problem confirm the need for rejecting the "broadened liability" contention and for holding that the identical *respondeat superior* test applies to torts of servicemen and civilian employees.

Although the opinion below does contain ambiguous language which may be read as restricting the area of federal liability for soldiers' torts, it is quite clear that the Court of Appeals also applied the conventional test in determining that Seabourn, the serviceman, was acting outside the scope of his employment. And it may well be that the insistence in the opinion that "line of duty" means line of military duty was not intended to discard the normal *respondeat superior* test for military personnel, but was included to make certain that liability for military torts would be based not on the broad "line of duty" concept employed in veterans' bene-

fit legislation but on the doctrine of *respondeat superior,* so that the Government would be liable only when the soldier, at the time of the accident, was furthering his military or business duties.

II

A. Two considerations are controlling in determining whether an employee has acted within the scope of his employment and has thereby exposed his employer to liability. First, the employee, at the time of the accident, must be engaged in furthering his employer's business. In the words of Judge Cardozo, the first or "dominant purpose must be proved to be the performance of the master's business." *Fiocco* v. *Carver,* 234 N.Y. 219, 223. The second essential requirement of the employer's vicarious tort liability under *respondeat superior* is that the employer must have the right of control over the employee at the time of the accident.

Neither of these two requirements was met here. Seabourn's unauthorized taking of the Government vehicle was not even remotely connected with his official duties. It was, in fact, contrary to the pertinent Army regulations. As emphasized by both courts below, Seabourn used the truck on a wild frolic and joy ride, rather than on military business of any kind. Moreover, since he was on pass and off duty, he was on his own and his specific conduct in driving was subject to the control of no one but himself.

B. Army vehicles are available under the regulations for use in authorized, organized, and super-

vised recreational activities. When so used, the soldier assigned to drive the vehicle acts within the scope of his employment because he has been authorized to drive it on Army-controlled and Army-supervised recreation. Seabourn, obviously, did not use the vehicle for any such purpose. His use of the vehicle, while joy riding and drunk, was, as the court below noted, "a far cry" from any authorized recreational activity. Petitioner insists that there existed a "custom" or "practice" in Seabourn's unit to use military vehicles for individual recreation at night, but even if that were true such a casual and surreptitious "custom" could not avail to counteract the Army regulation which plainly and explicity made his use of the car unauthorized and indicated that driving military vehicles for individual "recreation" of this type was not of benefit to the service.

C. The opinion below properly looks, we submit, to federal law in determining whether a serviceman's conduct is within the scope of his employment under the Act. Any other view would subject the Government-employee relationship to the force of dissimilar and frequently irreconcilable state laws.

In any event, the choice of law question presents no problem in this case. Whether resort be had to federal or state authorities, it is clear that there can be no *respondeat superior* liability where, as here, the employee obtains unauthorized possession of his employer's vehicle and has an accident while out on a wild frolic.

D. As pointed out above, the workmen's compensation test of "arising out of and in the course of employment" and the "service of the ship" concept drawn from maritime law—just like the broad "line of duty" standard for veterans' benefit purposes—can have no application in ascertaining the existence of a *respondeat superior* liability. But even if those three broad tests are invoked, there could not, in view of the facts here involved, be any liability on the part of the United States for Seabourn's tort.

III

Petitioner also argues that apart from the question of federal liability for Seabourn's tort there is "another avenue of governmental liability." The alternate ground urged by petitioner seems to be that liability should be predicated on Government ownership of the vehicle and on asserted negligence in entrusting it to Seabourn.

A. Several states do impose liability on the owner of a vehicle for its negligent operation irrespective of whether the operator was acting within the scope of his employment for the owner or was even in the owner's employ. But it seems settled that such a liability may not be imposed under the Tort Claims Act in view of the Act's express requirement that the tort of the Government employee be committed while acting within the scope of his employment.

B. The short answer to petitioner's argument that there was negligence in entrusting the vehicle to Seabourn is the fact that no such negligence was

drawn into issue by the complaint. The complaint asserted negligence only on the part of Seabourn in driving the vehicle. It did not assert negligence on the part of any other military or Government personnel. Thus, the United States has had no opportunity to present its evidence on the issue raised for the first time by petitioner in this Court. Furthermore, petitioner's evidence in the case fails to support the charge of negligence of any military personnel other than Seabourn.

ARGUMENT

I

Federal Liability Under the Tort Claims Act Extends Only to Torts of Federal Employees Acting Within the Scope of Their Employment.

A. *The Plain Terms of the Act*

The basic precondition of federal liability under the Tort Claims Act is set forth in 28 U. S. C. 1346(b), *infra*, p. 49. That section, in conferring jurisdiction on the district courts over tort claims against the United States, provides that the claim, to be cognizable under the Act, must arise out of the negligence of a Government employee while "acting within the scope of his office or employment." This "scope of employment" requirement is, as emphasized by the courts, "the very heart and substance of the act." *United States* v. *Campbell*, 172 F. 2d 500, 503 (C. A. 5), certiorari denied, 337 U. S. 957; *United States* v. *Eleazer*, 177 F. 2d 914 (C. A. 4), certiorari denied, 339 U. S. 903.

Since the common "law has always been that a master is not liable for the acts of his servant or agent unless acting within the scope of his employment," [3] it was natural for Congress, in defining the extent of governmental liability for tortious conduct of federal employees, to transplant this firmly established principle of *respondeat superior* into the Tort Claims Act. Thus, the bare terms of the Act

> make[s] it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of *respondeat superior* * * *. [*United States v. Campbell,* 172 F. 2d 500 (C. A. 5), certiorari denied, 337 U. S. 957]

Accordingly, in determining whether the United States is liable to a third party for the wrongful conduct of its employee, one must look to the traditional, common law development of the concept of "scope of employment" in the general law of torts, and not to the special meanings which that word may have acquired in the law of workmen's compensation or other legislation adopted to benefit

---

[3] *Psota* v. *Long Island R.R. Co.*, 246 N.Y. 388. For the historical development of *respondeat superior*, see Holmes, *Agency*, 4 Harv. L. Rev. 345, 354 (1891); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 330 (1894); Smith, *Frolic and Detour*, 23 Col. L. Rev. 444. The rationale of the law of *respondeat superior* has been traced by Justice Douglas in *Vicarious Liability and the Administration of Risk*, 38 Yale L. J. 584 (1929).

employees. Cf. *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 481; *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 423-4. Since Congress has made the United States liable, in general, as if it were a private employer, the same general principles of "scope of employment" govern under the Tort Claims Act as if an ordinary "common law" action had been brought by an injured third party against a private employer.

B. *The Same Standard of Federal Liability, Based on the Respondeat Superior Principle, Applies to Torts of Military and Civilian Personnel of the Government.*

Petitioner's primary position appears to be that the same *respondeat superior* principle applies "to the tort of a soldier as to the tort of a civilian employee" (Petitioner's Opening Brief, p. 20). However, she also contends, alternatively (Pet. Br. 21-22), that Congress desired to "broaden the liability [of the United States] for acts of members of the armed forces." We agree fully with petitioner's primary position and reject her secondary contention.

1. The argument advanced in support of the "broadened liability" theory is that 28 U. S. C. 2671 of the Act (*infra*, p. 50) defines acting within "the scope of employment" to mean "acting in line of duty" in case of military personnel; that the phrase "line of duty" has been construed in other statutes in a very liberal fashion so as to include conduct outside, as well as within, the

"scope of employment" test based on the conventional *respondeat superior* principle; and that this liberal construction must be mechanically applied to the Tort Act so as to make the United States liable for practically every tort committed by a soldier or sailor. Thus, since a soldier is considered to be in "line of duty" for pension and other disability benefit purposes if he is injured while on pass or while hitchhiking, petitioner's brief urges that the United States, under the Act, should also be held liable for injuries caused to third persons by such a soldier (pp. 21-22).

But this argument, aside from ignoring the significance of adding the word "acting,"[4] overlooks the need for attributing different meanings to a phrase like "line of duty," when it is used in statutes having totally distinguishable backgrounds and purposes. Moreover, the history and policy of the Tort Claims Act and the cases decided under it confirm the view that such a broadening of liability of the United States for torts of its military personnel, unrelated to their duties, was never intended by Congress.

a. It is, of course, not unusual for the same words to be used with different meanings in different acts, and, in fact, even in the same act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433. This

[4] The statutes and decisions dealing with "in line of duty" for compensation or dependency benefit purposes treat it as a status, not requiring any affirmative action on the serviceman's part or close association with the principal's business. The phrase "*acting* in line of duty" (the equivalent of "*acting* within the scope of employment") seems to imply a more positive connection with official work or services.

is especially true in legislation affecting servicemen. For example, this Court has held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat*, 124 U. S. 303), but, in a decision handed down the same day, held that such a clerk was an "officer" for the purpose of a different statute (*United States* v. *Hendee*, 124 U. S. 309). See *Mitchell* v. *Cohen*, 333 U.S. 411, 418; *Brooks* v. *United States*, 337 U. S. 49, 52. Such results, far from being inconsistent, simply effectuate the different legislative purpose underlying each of the statutes. Cf. *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48; *United States* v. *Dickerson*, 310 U. S. 554, 561. Certainly, the phrase "line of duty" is not capable of so standard and precise a definition [5] as would permit its application without "examination of the statutory scheme" and "without help from the context in which it appears and the purpose for which it was inserted in the statute." *Mitchell* v. *Cohen*, 333 U. S. 411, 417-418.

Here, petitioner's attempt to invoke the broad meaning given to the phrase "line of duty" in legislation granting benefits to servicemen or their dependents for injury or death incurred during military service disregards the basic reason for

[5] Apart from veterans' benefit legislation, where there is a broad social need for expanding the "line of duty" concept so as to award benefits to servicemen and their dependents, the phrase "line of duty" has frequently been restricted to acts performed in the discharge of required employment duties and has been limited to performance of the work of employment. *Allen* v. *The B., C.R. & N.R. Co.*, 57 Iowa 623, 627; *Mesker* v. *Bishop*, 56 Ind. App. 455, 464.

that broad scope. Congress has expanded the "line of duty" concept in such legislation to reward servicemen for the sacrifices caused by their separation from civilian life and for the understandable and desirable purpose of making benefit payments to such servicemen and their dependents in all situations except where the injury or death (1) was the proximate result of the serviceman's own misconduct or (2) occurred while he was deserting the service or under confinement by sentence of a military or civil court. See Act of September 27, 1944, 58 Stat. 752 (par. 8, E. O. 6098, March 31, 1933, Vet. Reg. No. 10, ch. 12A, 38 U. S. C.); cf. 32 Op. A. G. 12 (1919).

It is for that reason that even injuries sustained by a soldier in the course of his remunerative employment for a private concern, while he is on furlough from his military duties, are deemed to have been incurred in "line of his duty" for the purpose of awarding pension benefits. Veterans Administration Decision No. 715, June 28, 1946, on "Payment of pension for disability incurred while on pass (authorized leave) and in private employment," *Decisions of the Administrator of Veterans' Affairs,* vol. 1, p. 1470. It would follow, if petitioner's "broadened liability" contention is correct, that the United States would be liable under the Tort Claims Act to a third person injured by that soldier's negligence in the course of his private employ. So absurd a result makes it apparent that while a liberal interpretation of "line of duty" is justifiable to prevent a deprivation of veterans'

pension benefits, there obviously is no basis for thrusting such an interpretation into totally different legislation such as the Federal Tort Claims Act. There, the relationship of the serviceman to the United States is important only for the purpose of answering the question whether the serviceman, at the time of the tort, was sufficiently about the business of the United States so as to make the government liable for his torts.[6]

b. Nothing in the legislative history of the Federal Tort Claims Act warrants a carry-over of the broadened "in line of duty" concept. To the contrary, that history makes it reasonably clear that Congress never intended that the phrase "line of duty," in the definition section of the Act, 28 U. S. C. 2671, would lead to imposing liability on the United States for torts committed by military personnel outside the scope of their employment. The fact is that Congress added the phrase "line of duty" to the "scope of employment" definition in 28 U.S.C. 2671 because soldiers and sailors are generally not considered to be employees of the United States and hence the phrase "scope of employment" would have uncertain and awkward application to their conduct. As noted by Chief Judge Parker, the "line of duty" language was "doubtless used because it was felt that as to military and naval personnel 'line of duty' more correctly described action representing the govern-

[6] In *United States* v. *Campbell*, 172 F. 2d 500, 502 (C.A. 5), certiorari denied, 337 U.S. 957, Chief Judge Hutcheson saltily points out that failure to reject the "broadened liability" argument would subject the United States to liability "for practically everything a sailor or soldier does."

ment than 'scope of employment'." *United States* v. *Eleazer,* 177 F. 2d 914, 918 (C. A. 4), certiorari denied, 339 U. S. 903. This was expressly recognized by Congress in specifically defining "employee of the government," also in 28 U. S. C. 2671, to include "members of the military or naval forces of the United States." Further recognition was manifested in the committee reports accompanying several of the earlier tort claim bills which incorporated language similar to that appearing in Section 2671. See H. Rep. 667, 69th Cong., 1st sess., p. 6, on S. 1912; H. Rep. 286, 70th Cong., 1st sess., pp. 6-7, on H. R. 9285; H. Rep. 2800, 71st Cong., 3d sess, pp. 12-13, on H. R. 17168.

These definitions, it was pointed out at hearings on the predecessor bills, were inserted to "make it clear that the act covers all Federal agencies, including corporate instrumentalities, and all Federal officers and employees, *including members of the military and naval forces* and temporary and uncompensated employees" (emphasis added). Hearings before the House Committee on the Judiciary, 77th Cong., 2d sess., on H.R. 5373 and H.R. 6463, p. 7; see *Feres* v. *United States,* 340 U.S. 135, 138. The desire of Congress to employ apt language, in making certain that the Act would be held applicable to torts of military personnel, should not be wrenched "out of its context" so as to escape the Act's establishment of the liability of the United States on the basis of the normal *respondeat superior* relationship. *United States* v. *Campbell,* 172 F. 2d 500 (C.A. 5), certiorari denied, 337 U.S. 957.

c. All prior decisions dealing with this problem under the Tort Claims Act uniformly reject the "broadened liability" contention and hold that the same "scope of employment" doctrine applies to torts of servicemen and of civilian employees. In *United States* v. *Campbell,* 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957, the court declared that:

> The attempt then to wrench the phrase set out in quotations in 941(c) [now 28 U.S.C. 2671], "acting within the scope of his office or employment", out of its context in 931(a) [now 28 U.S.C. 1346(b)] and thus to give it a new and entirely different meaning, the greatly expanded one attributed to "in line of duty", when members of the armed forces themselves are claimants, is nothing more than an attempt to put the cart before the horse, to have the tail wag the dog. Such a construction would be to give to the phrase, "within the scope of his office or employment" not one consistent meaning throughout the act, but two inconsistent meanings, one of these applying to acts of all government employees except members of the armed forces, would subject the United States to liability to third persons for acts of its employees only as and to the same extent that a person in private employment would be liable under the law of the state where the accident occurred. The other, applying to acts of military personnel, would subject the Government to fantastic claims of

> liability having no relation to the doctrine of *respondeat superior,* as it is known and applied, in determining the liability of private persons. It would do this, too, in the face of the known purpose of the Tort Claims Act, as shown by its antecedent history, and the record made in its passage, * * *.

Similarly, *United States* v. *Eleazer,* 177 F. 2d 914, 918 (C.A. 4), certiorari denied, 339 U.S. 903, in rejecting the "broadened liability" contention, points out:

> It is argued, however, that, because the Tort Claims Act provides that, in the case of a member of the military or naval forces, "acting within the scope of his office or employment" means "acting in line of duty", the responsibility of the United States under the respondeat superior doctrine is greatly enlarged, since the phrase as used in prior legislation is construed to cover conduct without as well as within the scope of eployment as ordinarily understood. We are not impressed with this argument. It was the manifest purpose of Congress, plainly set forth in the words of the statute, to render the United States liable for the torts of its employees with certain specified exceptions, just as though it were a private person; and there could have been no possible reason to extend the rule of respondeat superior in the case of torts committed by military or naval personnel. The words of the

> statute relied on by plaintiff were doubtless used because it was felt that as to military and naval personnel "line of duty" more correctly described action representing the government than "scope of employment"; but it is clear, we think, that neither phrase as used in the act was intended to do more than provide for liability on the part of the government for acts committed by those carrying on its business under such circumstances as to render it liable therefor if it were a private person. * * *

Accord: *Rutherford* v. *United States,* 73 F. Supp. 867 (E.D. Tenn.), affirmed *per curiam,* 168 F. 2d 70 (C.A. 6); *Leonard* v. *United States,* 131 F. Supp. 694, 700 (D. Wyo.); *Baker* v. *United States,* 127 F. Supp. 644 (D.D.C.); *O'Connell* v. *United States,* 110 F. Supp. 612 (E.D. Wash.); *Stekovich* v. *United States,* 102 F. Supp. 925 (M.D. Pa.); *Greenwood* v. *United States,* 97 F. Supp. 996 (W.D. Ky.); *Cropper* v. *United States,* 81 F. Supp. 81 (N.D. Fla.); see also *Moye* v. *United States,* 218 F. 2d 81 (C.A. 5); *United States* v. *Lushbough,* 200 F. 2d 717 (C.A. 8); *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Sanchez* v. *United States,* 177 F. 2d 452 (C.A. 10); *McConville* v. *United States,* 197 F. 2d 680 (C.A. 2), certiorari denied, 344 U.S. 877; *Long* v. *United States,* 78 F. Supp. 35 (S.D. Cal.). The Supreme Court of Canada, in interpreting a statute similar to the Federal Tort Claims Act, has also employed the normal *respondeat superior* test in determining

liability of the Crown to third persons for the torts of military personnel. *King* v. *Anthony,* Canada Law Reports (S.C. 1946) 569.

2. Nor, contrary to the assertions in petitioner's brief, do we believe that the opinion below has totally disregarded the normal *respondeat superior* test in favor of "a narrower liability in the case of members of the armed forces" (p. 22). That the opinion below actually applied the conventional standard seems to us to be made clear by the court's repeated emphasis that Seabourn was out on a wild frolic "having no conceivable connection with the performance of any known military duty" and that he was not then "on military business of any kind" (R. 180, 181). Furtherance and performance of the employer's business is, as we will show (*infra,* pp. 26, ff.), the touchstone of *respondeat superior* liability. Since, as the opinion below notes, "a private employer could [not] be held liable in damages for the tortious act of an employee occurring on an allowed 'day off' while he is out driving on a joy ride while drunk," neither may *respondeat superior* liability be imposed on the United States for such an act (R. 179). See also R. 180, referring to the California cases on "scope of employment". Other portions of the opinion confirm the view that the court below *did* measure governmental liability for Cpl. Seabourn's tort under the conventional *respondeat superior* test. The opinion quotes with approval the language from *United States* v. *Eleazer,* 177 F. 2d 914, 918 (C.A. 4), certiorari denied, 336 U.S. 903, to the

effect that "the 'line of duty' language was used to 'more correctly' describe the conduct of military personnel in acting for the Government" (R. 181), and also the statement from *United States* v. *Campbell,* 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957, that "Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of *respondeat superior*" (R. 181). Obviously, the opinion below would not have relied on the *Eleazer* and *Campbell* cases if the court had intended, as petitioner now argues, completely to abandon the *respondeat superior* test for the tort involved here.[7]

As we pointed out in our brief in opposition (pp. 9-10), there is language in the Ninth Circuit's opinion which can be read as going further—as imposing an *additional,* narrowing, requirement that servicemen must not only be acting within the

---

[7] Judge Bone, who authored the opinion below, recognized that the *respondeat superior* doctrine applies to both torts of military and civilian personnel in his earlier, dissenting opinion in *Murphey* v. *United States,* 179 F. 2d 743, 746-747 (C.A. 9):

> The Fifth Circuit has held that, as used in the Act, "line of duty" is equivalent to "scope of employment" and is to be determined by the doctrine of respondeat superior in the same manner and to the same extent as the liability of private persons under the doctrine is measured in the various states. United States v. Campbell, 5 Cir., 172 F.2d 500, certiorari denied 337 U.S. 957, 69 S. Ct. 1532. See also Hubsch v. United States, 5 Cir., 174 F. 2d 7. I think that these two cases correctly state the proper rule of law, are in point, and (under California law) should control our decision in this case.

scope of employment under normal *respondeat superior* principles, but also that they be serving in line of "military" duty. See R. 179. This portion of the opinion is unclear. By its insistence that "line of duty" means line of *military* duty, the court may possibly have been trying to make certain that liability for military torts would be based not on the broadened "line of duty" concept employed in veterans' and servicemen's benefit legislation but on the ordinary doctrine of *respondeat superior,* so that the Government would be liable only when the soldier was furthering his military or official or "business" duties. With such a construction we, of course, agree. But if the court was laying down, by way of alternative holding, that "scope of employment" is generally narrower for military personnel than for civilians, we part company. Our position is, as stated above (*supra,* pp. 14-23) that the general standard is the same for all "employees" of the Government, civilian or military. However, this difference with one part of the opinion below does not affect, in any way, our support of the result, for the court made it crystal clear that it also (and primarily) tested Seabourn's conduct by normal employer-employee rules (*supra,* pp. 23-24).

II

Cpl. Seabourn Was Not Acting Within the Scope of His Employment When, While on Pass, He Obtained Unthorized Possession of the Military Vehicle and Went Joy Riding in It.

A. *Respondeat Superior Liability Is Imposed Only Where the Servant Is Engaged in His Master's Business and Is Subject to His Control at the Time of the Accident*

It is familiar law that the "true test" for application of the *respondeat superior* doctrine, in common law damage actions, is whether the servant, at the time of the accident, was "conducting the master's affairs * * *. The master's responsibility cannot be extended beyond the limits of the master's work." *The Standard Oil Co.* v. *Anderson,* 212 U.S. 215, 221; *Farwell* v. *Boston and Worcester Railroad Corporation,* 4 Metcalf 49, 55-56. The "ground of liability of the master for the negligent act of the servant is that the servant is conducting the master's affairs." *United States* v. *Eleazer,* 177 F. 2d 914, 916 (C.A. 4), certiorari denied, 339 U.S. 903. The "dominant purpose," as stated by Cardozo, J., "must be proved to be the performance of the master's business." *Fiocco* v. *Carver,* 234 N.Y. 219, 223. Obviously, if the employee is not prosecuting or furthering his employer's business, "his acts cannot, upon the doctrine of *respondeat superior,* be imputed to the employer. * * * No jurisprudence with which we are familiar holds to the contrary or states the principle differently."

Johnson v. *Esso Standard Oil Co.*, 211 F. 2d 397, 399, 400 (C.A. 5).

There is a second essential element of the employer's "vicarious liability in tort" under the *respondeat superior* theory, *i.e.*, the employer must have the right and power to direct and control the employee in the performance of the negligent act or omission which caused the injury. *Board* v. *Hearst Publications*, 322 U.S. 111, 120-121, 128; *Standard Oil Co.* v. *Anderson*, 212 U.S. 215, 221; *United States* v. *Eleazer*, 177 F. 2d 914, 916-7 (C.A. 4), certiorari denied, 339 U.S. 903; *Craige* v. *Austin Powder Co.*, 91 F. 2d 664 (C.A. 4); *P. F. Collier & Son Co. v. Hartfeil*, 72 F. 2d 625 (C.A. 8); *Phelps* v. *Boone*, 67 F. 2d 574 (C.A. D.C.), certiorari denied, 291 U.S. 677; *Standard Oil Co.* v. *Parkinson*, 152 Fed. 681, 682 (C.A. 8); *Brady* v. *Chicago and G. W. Ry. Co.*, 114 Fed. 100 (C.A. 8); see also *Conversions and Surveys* v. *Roach*, 204 F. 2d 499, 501 (C.A. 1); *Restatement, Agency*, § 228, comment c; § 229, comment c.

The absence of either one of these two conditions —the furtherance of the employer's business or the right of control—prevents the imposition of *respondeat superior* liability on the employer. In the instant case, neither of these two conditions exists.

1. *Cpl. Seabourn Was Not on Government Business at the Time of the Accident.* Seabourn's regular duty was that of supply clerk (R. 13). On the day of the accident, March 3, 1949, he was on pass, "did not work at all," and "just took off" (R. 14,

24). His taking and use of the Government vehicle was not even remotely connected with his duties as a supply clerk or with any other "official duties" (R. 17, 26). Instead, he took possession of and used the vehicle to indulge in joy riding and in drinking. As emphasized by the courts below, when "[r]educed to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured" petitioner and "was not * * * on military business of any kind" (R. 180, 47).

This case is on all fours with *King* v. *United States,* 178 F. 2d 320 (C.A. 5), certiorari denied, 339 U.S. 964, where an Army flier, without authority of his superiors, obtained, flew, and later crashed an Army Air Force plane causing damage to plaintiff. In affirming summary judgment for the United States, the court, in language which seems to fit the instant case as if written for it, emphasized that the employee "was not acting in line of duty when he left the army post, got drunk, returned, and took off as he did with a plane, which crashed into appellant's house. In so doing, [he] was on a frolic of his own, and was not in any manner serving the interests of the United States" (178 F. 2d at 322).

2. *The Government Had No Right to Control Seabourn in the Performance of the Negligent Act Which Caused the Injury.* It cannot be challenged that Seabourn, at the time of the accident, was on pass and free of any military duty (R. 17, 26, 51, 170, 179). His relationship to the Government while on this pass or off-duty status "was not analo-

gous to that of a soldier * * * performing duties under orders." *Feres* v. *United States,* 340 U.S. 135, 146. A soldier who is off duty or on pass is not engaged in the business of the United States. This Court early stated that, while on pass or leave, a serviceman "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses." *United States* v. *Williamson,* 23 Wall. 411, 415. The leave is a favor extended "for his sole accommodation" to permit him to "enjoy a respite from military duty." *Foster* v. *United States,* 43 C. Cls. 170, 175; see *Hunt* v. *United States,* 38 C. Cls. 704, 710.

The vital distinction between being on a pass or off-duty status and acting subject to military orders has been noted in cases under the Tort Act. *E.g., Brooks* v. *United States,* 337 U.S. 49; *Feres* v. *United States,* 340 U.S. 135. When a soldier is off duty, he is "on his own" and his specific conduct is normally "subject to the control of no one but himself." *United States* v. *Sharpe,* 189 F. 2d 239, 241 (C.A. 4); *United States* v. *Eleazer,* 177 F. 2d 914, 916 (C.A. 4), certiorari denied, 339 U.S. 903; *Sanchez* v. *United States,* 177 F. 2d 452, 453 (C.A. 10); *Rutherford* v. *United States,* 73 F. Supp. 867, 868-869 (E.D. Tenn.), affirmed, 168 F. 2d 70 (C.A. 6). Application of *respondeat superior* should no more suffice to make the Government responsible for the negligence of a soldier who is absent from his post of duty on a pass than it would suffice to impose liability for the acts of a soldier while absent without leave. *United States* v. *Sharpe,* 189 F. 2d at

240, 241 (C.A. 4). Petitioner recites (Pet. Br. 37-38) the general restraints on servicemen while off-the-post on pass or furlough, but these broad rules of conduct—comparable in many respects to restrictions imposed by some federal agencies on their civilian employees—obviously do not constitute the type of specific "control" over the particular conduct resulting in the injury which the principle of *respondeat superior* implies. If a service's general control over its men at all times were sufficient, the United States would be automatically liable for all torts committed at any time or place by servicemen, and "line of duty" would be broadened, for the Tort Claims Act, far beyond the expanded concept used even in benefit legislation.

3. *The "Recreational Activity" Label, Placed by Petitioner on Seabourn's Unauthorized Use of the Military Vehicle for Drinking and Joy Riding, Does Not Bring It within the Scope of His Employment.*

The armed services, as petitioner asserts, are, of course—like many other employers—"directly concerned with the morale and recreation" of servicemen. A sound recreational program improves employees' morale and efficiency, enables them to maintain work at a high level, and thus indirectly benefits the employer's business.[8] And we recognize

---

[8] The decided cases, however, take the view that the benefits inuring to the employer through improved employee morale are too indirect and intangible to justify imposition of *respondeat superior* liability. Thus, the courts have noted that

that there may be even greater need for employer-organized and employer-supervised recreational activities where employees are based on an island, like Guam, thousands of miles removed from the homeland.

The pertinent Army Regulations, No. 700-105 (*infra*, pp. 50-51), do allow the use of Army vehicles, whenever possible, for "authorized, organized, and supervised recreational" activities. When the vehicles are so used, the driver assigned to drive the vehicle acts within the scope of his employment because he has been authorized to drive it and because employer-controlled and employer-supervised recreation may be viewed as furthering the employer's business. In our view, *Murphey* v. *United States*, 179 F. 2d 743 (C.A. 9), which is so

---

increased employee morale and loyalty does not warrant the conclusion that "the servant taking advantage of this permission [to use the employer's car] is in a legal sense promoting or facilitating the master's business." *Adams* v. *Quality Service Laundry & Dry Cleaners*, 253 Wis. 334, 337; *Gewanski* v. *Ellsworth*, 166 Wis. 250, 253. See also *Rogers* v. *A.-C. Mfg. Co.*, 153 Ohio St. 513 (employer not liable for tort of employee playing on employer's team in industrial golf league); *Toms* v. *Delta Savings & Loan Ass'n*, 162 Ohio St. 513 (employer not liable for tort of baseball player where employer furnished team with uniforms and equipment); *Stenzler* v. *Standard Gas Light Co. of N. Y. City*, 179 App. Div. 774, affirmed, 226 N. Y. 681 (employer not liable for injuries resulting from collision with its truck which was lent to employees for use on a picnic); *Harrington* v. *Border City Manuf. Co.*, 240 Mass. 170 (employer not liable for injuries resulting from baseball game played by employees during lunch hour on employer's premises); *Beatty, Appellant* v. *Firestone T. & R. Co.*, 263 Pa. St. 271; *Reilly* v. *Connable*, 214 N.Y. 586; *Stenger* v. *Mitchell*, 70 Ga. App. 563; *Loucks* v. *R. J. Reynolds Tobacco Co.*, 188 Minn. 182.

heavily relied upon by petitioner, holds nothing more than that the driver of an Army truck, acting pursuant to orders in carrying an organized group of soldiers into town for a specified recreational activity, is within the scope of his employment even though the accident happened about two or three blocks off his prescribed route. See the discussion of the *Murphey* case in the opinion below, R. 174-5. The same principle applies to the administrative decisions cited at Pet. Br. 35.

In the instant case, it is plain that Seabourn was not using the vehicle to transport military personnel in connection with an organized and authorized activity. Instead, his taking and use of the vehicle was "unauthorized," "without the knowledge or approval" of his superior officers, and in contravention of applicable Army Regulations (R. 47, 180). When the accident happened, Seabourn, whose entire trip was unauthorized, had not merely deviated from a prescribed, official route, as had the soldier in the *Murphey* case. Seabourn's "wild, reckless and wholly independent act of violence" while joy riding and drunk was, as the court below observed, "a far cry" from any recreational activity authorized in the Army Regulations (R. 180). Moreover, the theory that a recreational activity subjects an employer to a *respondeat superior* liability is the assumption, noted above, that the activity will improve the employee's efficiency and increase his work output, with the resulting benefit to the employer.[9] Obviously, Seabourn's

[9] Cf. cases cited *supra*, fn. 8, pp. 30-31.

conduct, far from being calculated to improve his efficiency, was much more likely to result in a serious accident with disabling injuries which would impair, if not completely destroy, his work efficiency. *Supra,* pp. 27-28.

Throughout her brief (e.g., Pet. Br. 7, 29, 40-41, 42-43, 45), petitioner (i) assumes that the record requires a finding of a custom or practice in Seabourn's unit to use military vehicles, issued to others for official use, for individual recreational purposes, and (ii) urges that this "custom" or "practice", although in plain contravention of the regulations, is enough to demonstrate that Seabourn was acting within the scope of his employment. The state of the record on this point should first be made clear. As our Statement, *supra,* pp. 3-5, shows, there is slight evidence of such a custom; both courts below assumed that it might exist but, apparently because of the meagerness of the evidence, neither accepted petitioner's proposed factual finding that Seabourn's use of the vehicle "was in accordance" with such an "established custom." (R. 45, 49, 55, 180). In addition, both courts found that no responsible official authorized Seabourn's use of the vehicle (R. 47, 172, 180), and the Court of Appeals indicated that, if the claimed practice existed, no proper officer countenanced or knew about it (R. 180). Both courts also agreed that the custom, if there was one, was in violation of the applicable military regulation.

For the purposes of this case in this Court, we may assume that in Seabourn's particular unit mil-

itary vehicles were passed on from one serviceman to another and surreptitiously used, despite the trip ticket, for off-the-post individual recreation. But that casual and illegal practice cannot transform Seabourn's drunken frolic into a recreational activity within the scope of his employment. In the first place, as we have just pointed out (*supra,* pp. 32-33), "recreation" of this character can hardly be termed an aid to the maintenance or improvement of the efficiency of the troops. Secondly, the pertinent Army regulation forbade any practice of passing vehicles around and using them as Seabourn did here (*infra,* pp. 50-51), and his driving was therefore clearly unauthorized. In *McConville* v. *United States,* 197 F. 2d 680, 683, 684 (C.A. 2), certiorari denied, 344 U.S. 877, the Second Circuit laid it down as a requirement, in military vehicle Tort Claims Act cases, that there be proper authorization to use the car for a purpose within the pertinent regulations.[10] That limitation is an appropriate and necessary one, for the regulations and directives generally mark the boundaries of the area of military, as distinguished from purely personal, activity.

---

[10] As our unsuccessful petition for certiorari in *McConville* indicates (No. 369, Oct. Term, 1952), we do not agree with the Second Circuit's holding that the United States is liable for injuries caused by the driving of a serviceman, bent on his own frolic, who has procured the vehicle and the permission of his superiors by fraudulently representing that his mission is proper official business. But of course we agree that, at the very least, the authorization should formally be for a proper purpose, allowable under the regulations.

We do not mean to argue that no serviceman whose activity is in violation of a regulation can ever be held to be acting within the scope of his employment. Perhaps if the whole action is plainly for the benefit of the service, an incidental violation in means or method can be ignored; the rulings of The Judge Advocate General discussed by petitioner at pp. 44-45, 48 of her brief fall within that class. But certainly where, as here, the regulations reveal that a particular activity is definitely not beneficial to the service and is not to be undertaken, a court would not be justified in holding the serviceman to be within his employment while carrying on that precise activity simply because there had grown up in his company a practice of violating and ignoring the regulation for personal ends.

B. *Federal Law Governs the Issue of "Scope of Employment" but the Facts Here Prevent Such a Finding Irrespective of Whether State or Federal Law Applies.*

1. To determine whether a Government employee, military or civilian, is acting within the scope of his employment for the purpose of the Tort Claims Act, we must look to federal law and decisions (R. 45). In passing on this precise question, the Court of Appeals for the Fourth Circuit has stated:

> We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an "employee of the Government * * * acting within the scope of his

> office or employment." * * * The Tort Claims Act adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the government to its employees. [*United States* v. *Sharpe,* 189 F. 2d 239, 241.]

The employment relationship between the Government and its employees "is distinctively federal in character" and is "governed exclusively by federal law." *Feres* v. *United States,* 340 U. S. at 143 ,146. Since "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources," they must be "governed by federal authority." *United States* v. *Standard Oil Co.,* 332 U. S. 301, 305-306; *United States* v. *Gilman,* 347 U. S. 507, 511. It "would hardly be a rational plan" to subject the employment relationship between the Government and its employees to the force of 48 sets of dissimilar and frequently irreconcilable statutes and decisions. *Feres* v. *United States,* 340 U. S. 135, 143. Such a result, notwithstanding petitioner's assertions, should not be lightly attributed to Congress.

The opinion of the court below recognizes the need for resort to federal law where the tort, as here, was committed by military personnel, but would apparently select local law with respect to torts of civilian personnel. For the reasons already outlined, it is our view that federal law must determine the relationship between the Government and all of its employees, civilian and military.

2. In any event, the choice-of-law question presents no problem in this case. Regardless of

whether resort be had to federal authority or to state court decisions, it is fundamental that an employee's negligence will not be imputed to his master if the negligence occurs when the servant has obtained unauthorized possession of the master's vehicle and takes it out for drinking and joy riding while on a wild frolic. All federal and state authorities recognize that the touchstone for *respondeat superior* liability is the servant's conduct in furtherance of his master's business at the time of the accident and that the master is therefore not responsible for the accident of a servant on a frolic of his own. See *Johnson* v. *Esso Standard Oil Co.*, 211 F. 2d 397, 398-9 (C. A. 5); *Standard Oil* v. *Anderson*, 212 U. S. 215, 221.

California [11] follows the same rule. See *Kish* v. *California State Automobile Assn.*, 190 Cal. 246, 248 (no *respondeat superior* liability because employee not in performance of any act connected with the business of his employer when he had finished his work for the day and while off duty was on his way downtown for supper); *Lee* v. *Nathan*, 67 Cal. App. 111 (no *respondeat superior* liability where employee was driving the employer's vehicle after duty hours while pursuing his own ends even though injuries could not have been committed without the facilities so afforded to the employee by the employer); *Slater* v. *Friedman*, 62 Cal. App. 668, 672 (holding that where the servant's "act is done while the servant is at liberty from service and pursuing his own ends exclusively,

[11] Guam has adopted, as stated in the opinion below, "the rule of *respondeat superior* in force in California. It is thus 'the law of the place', i.e. Guam" (R. 170). See also *United States* v. *Johnson*, 181 F. 2d 577, 580-581 (C.A. 9).

there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to the master"). And the Court of Appeals below stated emphatically that the California decisions would not support an award to petitioner (R. 180).

C. *The United States Would Not Be Liable for Cpl. Seabourn's Tort Even If There Were Applied the Broad "Line of Duty" Test, the Workmen's Compensation Test, or the "Service of the Ship" Test.*

Up to this point we have shown (1) that Congress intended a uniform *respondeat superior* test for determining whether there should be governmental liability under the Act for torts of military personnel and other federal employees; (2) that the broad construction accorded the phrase "line of duty" in other legislation has no place within the framework of the Tort Claims Act; and (3) that under the facts as found by both courts below the United States cannot be held liable under *respondeat superior* in this case. We will now point out that even application of the broad "line of duty" test would not, because of the facts found, result in liability on the part of the United States. The same considerations will establish that petitioner's reliance on cases drawn from the workmen's compensation field and the "service of the ship" concept is completely misplaced, even if the general standards announced in those bodies of law be accepted.

1. *The Broad "Line of Duty" Test.* Under this test, as defined by Congress for veterans' pension and other administrative benefit purposes, a serviceman may not be deemed to be in "line of duty" when his injuries are "the result of his own willful misconduct." Act of September 27, 1944, 58 Stat. 752. The pertinent Army Regulations implementing this statutory definition provide that "negligence so gross as to evidence a reckless or wanton disregard of the consequences thereof should be regarded as willful" misconduct. A. R. 600-140, par. 2. The same regulations provide, in addition, that an injury resulting from the "intemperate use of intoxicating liquor" shall also be considered as having resulted from the type of misconduct which bars a "line of duty" finding. A. R. 600-140, par. 2.

The facts in the record establish that Seabourn's misconduct at the time of the accident would preclude a "line of duty" finding under both quoted provisions of the Army Regulations. The two lower courts found that he had obtained unauthorized possession of the Army vehicle, got drunk, and while on a joy ride injured petitioner. As noted by the court below, "there was overwhelming evidence that Seabourn was drunk" (R. 168). Seabourn himself acknowledged that he was intoxicated (R. 25). And his "irresponsible" joy riding "late at night" led to his "wild, reckless and wholly independent act of violence" against petitioner.[12]

---

[12] Seabourn's joy ride and reckless conduct was plainly "criminal," as observed by the court below (R. 180). See the

Seabourn's drunkenness, standing by itself, shows that even under the broad military standard of "line of duty," Seabourn was not in "line of duty." Furthermore, his irresponsible driving falls well within the established meaning of the misconduct described in the other quoted provision of the Army Regulations, *i. e.,* gross negligence manifesting a "reckless or wanton disregard of the consequences." A. R. 600-140, par. 2. Obviously, his conduct created an unreasonable risk and a high degree of probability of bodily harm. See *Restatement Torts,* Section 500, Comment (g), and Section 502, Comment.

2. *The "Workmen's Compensation" Test.* Perhaps the closest analogy to the broad "line of duty" definition used in determining whether service-incurred injuries are compensable for pension and disability benefit purposes is the requirement in workmen's compensation law that a work injury, to be compensable, must be one arising out of and in the course of employment. This test, like the "line of duty" standard, has been very liberally interpreted so as to further the desirable purpose of making provision for employees and their dependents whenever the employees' earning capacity has been impaired or destroyed by an injury while at work or incident to it.

Manual for Courts-Martial, U. S. Army (1949), p. 330, par. 159, which sets forth the specification form for the offense of "joy riding"; see also Manual for Courts-Martial, United States (1951), p. 362; *United States* v. *Phillips,* Court-Martial Reports, JAG, Air Force, vol. 1, pp. 1, 4; *United States* v. *Griffith,* 3 id., pp. 235, 240; *United States* v. *Ashford,* Court-Martial Reports, JAG, Armed Forces, vol. 3, pp. 201, 204; *United States* v. *McMains,* 9 *id.,* pp. 338, 341.

For those reasons, the "arising out of and in the course of employment" test is not confined by common law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 481; *Matter of Waters* v. *Taylor Co.*, 218 N. Y. 248, 251. It is, therefore, not "necessary [for workmen's compensation benefit purposes] that the employee be engaged at the time of the injury in activity of benefit to his employer." *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 507.

As we have already pointed out (*supra*, pp. 12-14, 16-17), those same reasons show that the liberal interpretation of the "arising out of and in the course of employment" test in the administration of compensation laws has no application in determining whether an employee's conduct exposes the employer to a vicarious liability to a third person for his tort under the *respondeat superior* principle. But it is appropriate to note that, as in the "line of duty" situation, Seabourn's intoxication would have barred a "course of employment" finding even under the liberal workmen's compensation benefit test. By specific statutory provision, 36 states provide that an employee's intoxication will bar an award of workmen's compensation benefits. Larson's *Workmen's Compensation Law* (1952), vol. 1, p. 490; Schneider, *Workmen's Compensation Text* (1948), vol. 6, pp. 342-351, 492. In the remaining jurisdictions, intoxication has been held to bar benefits on the ground that the claimant was guilty of misconduct or had abandoned his employment by making himself incapable of discharging the duties of that employment. See

Emery Motor Livery Co. v. *Indus. Com.*, 291 Ill. 532, 534; *O'Neil* v. *Fred Evens Motor Co.*, 160 S. W. 2d 775, 779 (Mo. App.); *Roebling's Sons Co.* v. *Industrial A. Com.*, 36 Cal. App. 10, 13, 14.

3. *The "Service of the Ship" Test.* Similar considerations show the inapplicability of the "service of the ship" cases (Pet. Br., p. 33). These seamen cases simply hold that the shipowner's liability to the seaman for maintenance and cure is not cut off where the seaman, during the term of a shipping engagement, is injured while on shore leave. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724; *Warren* v. *United States*, 340 U. S. 523. The cases underscore the traditional view that the seaman is "a member of a favored class. He is a ward of the admiralty." *Warner* v. *Goltra*, 293 U. S. 155, 162. Indeed, this Court has noted that the shipowner's obligation to the seaman under the "service of the ship" concept is even broader than the "course of employment" test in workmen's compensation statutes (*Aguilar* v. *Standard Oil Co.*, 318 U. S. 732; *Norton* v. *Warner Co.*, 321 U. S. 565, 570), and it is possible for a seaman to be in the "service of the ship" even though he "has at the time no duty to perform for the ship" or while he is on shore leave. *Warren* v. *United States*, 340 U. S. 523, 529-530.

Accordingly, that test, like the broad "line of duty" standard for military benefits and the liberal workmen's compensation rule of "course of employment," has no relevance here. However, even with respect to the seaman's right to maintenance

and cure under the "service of the ship" test, willful misconduct or reckless disregard by a seaman for his own safety will bar a recovery. *Warren* v. *United States,* 340 U. S. 523, 528; *The Ben Flint,* 3 Fed. Cas. No. 1299 (D. Wis.). As the record makes clear, Seabourn's joy ride while drunk was an irresponsible act in reckless disregard of his own safety as well as that of others. A seaman in Seabourn's situation would have forfeited his rights under even the "service of ship" test.

III

Federal Liability Under the Tort Claims Act May Not Be Predicated on Government Ownership of the Vehicle Driven by Seabourn.

For the reasons set forth in Points I and II, we believe that the only type of liability cognizable under the Tort Claims Act is a *respondeat superior* liability and that under the facts found by both courts below there can be no such liability here for Seabourn's tort.

Petitioner's brief urges, however, that there is another "avenue of governmental liability" (Pet. Br. 51). The argument seems to be that the vehicle involved was a government-owned vehicle and that there was, in addition, negligence in entrusting it to Seabourn. But government ownership of the vehicle cannot, by itself, justify liability under the Act for its negligent operation. Nor does the record in any way show negligence on the part of any other military personnel in connection with Seabourn's assumption of unauthorized possession of the vehicle.

A. *Government Ownership of a Vehicle Does Not Subject the Government to Liability*

It is true that in at least eleven jurisdictions—including California, whose law is generally followed in Guam,[13] where the instant case arose—the owner of a vehicle may be held liable for its negligent operation even though the vehicle was not, at the time of the accident, used in the owner's business.[14] In these jurisdictions, liability is placed on the owner as an incident and responsibility of ownership, without regard to scope of employment or *respondeat superior* principles. Indeed, the chief purpose of such a liability is to hold the owner responsible for damages "where the principle of *respondeat superior* is inapplicable." *Burgess* v. *Cahill,* 26 Cal. 2d 320, 323; *Casey* v. *Fortune,* 78 Cal. App. 2d 922, 925-926.[15] But, as we have shown

---

[13] *United States* v. *Johnson,* 181 F. 2d 577, 580-581 (C.A. 9); see fn. 11, *supra,* p. 37.

[14] Ten states have achieved that result through the so-called "imputed liability" or "permissive use" statute. Deering's Calif. Code, Veh. Code Ann. § 402 (1948); D.C. Code § 40-403 (1940); Idaho Code Ann. § 49-1004 (1948); Iowa Code Ann. § 321.493 (1949); Mich. Stat. Ann. § 9.2101 (Supp. 1949); Minn. Stat. Ann. § 170.54 (1946); N. Y. Veh. & Traffic Law § 59 (Supp. 1951); R. I. Gen. Laws 1938, c. 98, § 10 (1938), as amended by Pub. Laws 1940, c. 867, § 1; Wis. Stat. § 85.01 (1a)(c) (1949). Florida has adopted the same rule by decision. *So. Cotton Oil* v. *Anderson,* 80 Fla. 441; *Lynch* v. *Walker,* 159 Fla. 188.

[15] Unlike a cause of action based on conventional *respondeat superior* liability, liability under the California "imputed liability" or "permissive use" statute is limited to $5,000 for the death of or injury to one person. Deering's Calif. Code, Veh. Code Ann. § 402(b) (1948); *Snodgrass* v. *Hand,* 220 Cal. 446, 447.

(*supra,* pp. 12-14), the basic precondition of federal liability under the Tort Claims Act is the requirement of 28 U.S.C. 1346(b) that the tort of the government employee be committed *while he was acting within the scope of his office or employment.* Since the California type of statute creates a cause of action against the owner of a vehicle for the negligence of its driver, irrespective of whether the driver was acting within the scope of his employment or was even in the owner's employ, it is clear that such liability may not be fastened on the United States in the face of the contrary requirement of the Tort Claims Act.

Recognizing the foregoing considerations, all of the cases involving this problem are in agreement that, notwithstanding state law, federal ownership of the vehicle causing the accident is insufficient to impose liability on the United States under the Federal Tort Claims Act. Thus, the Fifth Circuit in *In re Texas City Disaster Litigation,* 197 F. 2d 771, 776, pointed out that "liability because of the ownership of property is not included in the Act." This Court, in affirming that decision *sub nom. Dalehite* v. *United States,* 346 U.S. 15, 45, expressly stated its concurrence with the view that "liability does not arise by virtue either of United States ownership of an inherently dangerous commodity or property." Similarly, Chief Judge Magruder, foreshadowing the *Dalehite* holding, observed in *United States* v. *Hull,* 195 F. 2d 64, 67 (C.A.1):

> Thus, in certain cases, under local law a private person may be liable without fault for injuries resulting from properly conducted ac-

tivities deemed "ultra-hazardous." Restatement of Torts § 519. But the United States would not be subject to suit on such a liability, for under 28 U.S.C. § 1346(b), the United States has consented to be sued only where the injury was "caused by the negligent or wrongful act or omission" of some employee of the government while acting in the scope of his office or employment.

* * * * *

Or again, under a statute like § 59 of the New York Vehicle and Traffic Law, McK. Consol. Laws, c. 71, a private person owning a motor vehicle may be liable for injuries resulting not only from the negligent operation of the vehicle by a servant while acting within the scope of his employment, but also from the negligent operation of the vehicle "by any person legally using or operating the same with the permission, express or implied, of such owner"; thus the owner may be liable under such a statute for the negligence of an authorized bailee using the car on some business other than that of the owner. Cf. Hubsch v. United States, 5 Cir., 1949, 174 F. 2d 7, 10, certiorari dismissed 1950, 340 U. S. 804, 71 S. Ct. 35, 95 L. Ed. 590. The latter case does not fall within the terms of the Federal Tort Claims Act, since the negligent bailee would not be an employee of the government acting within the scope of his employment.

Accord: *Jackson* v. *United States,* 196 F. 2d 725 (C.A. 3), (adopting the *Hull* opinion); *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Hubsch* v. *United States,* 174 F. 2d 7 (C.A. 5), writ of certiorari dismissed, 340 U. S. 804; *Williams* v. *United States,* 189 F. 2d 607 (C.A. 10); *Sanchez* v. *United States,* 177 F. 2d 452 (C.A. 10); *United States* v. *Lushbough,* 200 F. 2d 717 (C.A. 8); *Cropper* v. *United States,* 81 F. Supp. 81 (N.D. Fla.); *Long* v. *United States,* 78 F. Supp. 35 (S.D. Cal.).[16]

B. *There Was No Negligence in Allowing Seabourn to Take Possession of the Vehicle.*

Petitioner's remaining suggestion is that there was negligence on the part of the dispatcher and Lt. Werb in issuing the vehicle to Cpl. Seabourn. The short answer to this argument is that the only issue of negligence drawn into issue by the complaint and the only issue of negligence tried by the district court was the negligence of Seabourn in

[16] There is an additional reason militating against application of the "permissive use" or "imputed liability" theory to the instant case. Under that type of liability it is necessary to establish not only proof of ownership of the car but also permission to drive it. *Krum* v. *Malloy,* 22 Cal. 2d 132; *Du Bois* v. *Owen,* 16 Cal. App. 2d 552, 556. Mere possession of the car by one other than the owner is not sufficient to establish the fact that it was with the owner's permission. *Mucci* v. *Winter,* 103 Cal. App. 2d 627, 631. Here, the trip ticket showed that the vehicle was to be used for official business only. Moreover, Seabourn's superiors had neither the power under the pertinent statutes and regulations nor the intent to authorize the use of the vehicle for an evening of drinking and joy riding. This is confirmed by the concurrent findings below to the effect that Seabourn's use of the vehicle was unauthorized (see *supra,* pp. 3-7, 27-28, 30-35).

operating the vehicle (R. 1-2). Since the complaint did not even attempt to assert negligence on the part of any other military personnel, obviously the United States has had no opportunity to present evidence on the issue—raised for the first time by the petitioner's brief on the merits in this Court. Moreover, if that issue had properly been raised at any time during the trial the Government would have been in a position to introduce competent evidence to disprove negligence of any military personnel other than Seabourn. Thus, the Government would probably have been able to establish, through depositions or other competent evidence, (1) that when Seabourn approached Stiles for the trip ticket, Seabourn "appeared to be sober" to Stiles (R. 155); (2) that Stiles "wouldn't have given him the trip ticket if he was drunk" and (3) that Stiles assumed that the vehicle, which was limited to use on the post, would be used by Seabourn on the post and in connection with "official business only" (R. 148, 155).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

SEPTEMBER, 1955.

APPENDIX

A. Sections 1346(b), 2674, and 2671 of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983), provide in pertinent part:

SECTION 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SECTION 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

SECTION 2671. *Definitions.*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

B. Army Regulations 700-105 (30 June 1948) provide in pertinent part:

26. *Use of vehicles.*— * * *

b. Motor vehicles * * * will be operated * * * only if properly dispatched on WD Form 48 (Drivers' Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the appropriate commander under existing authority may direct.

c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

* * * * *

28. *Special uses.*—Motor vehicles, when available without detriment to other official business * * * may be used by special direction of the commanding officer for the following purposes:

a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized, organized, and supervised recreational, welfare, and morale-building activities.

* * * * *

29. *Motor pools.*— * * *

d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency or individual, except as prescribed herein.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1959 887467 001